

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 -----x
4 UNITED STATES OF AMERICA,
5 Plaintiff,

04-CR-1016
(NGG)

6 versus

United States Courthouse
Brooklyn, N.Y. 11201

7 RONELL WILSON,

8 Defendant.
9 -----x

November 28, 2012
9:00 A.M.

10 ***VOLUME IV***

11 TRANSCRIPT OF CRIMINAL CAUSE FOR HEARING
12 Before HON. NICHOLAS G. GARAUFGIS,
13 UNITED STATES DISTRICT JUDGE

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Proceedings

1 (In open court.)

2 (Defendant present in open court.)

3 COURTROOM DEPUTY: All rise. The United States
4 District Court for the Eastern District of New York is now in
5 session. The Honorable NICHOLAS G. GARAUFIS is now presiding.

6 (Honorable NICHOLAS G. GARAUFIS takes the bench.)

7 COURTROOM DEPUTY: Calling CRIMINAL CAUSE FOR
8 HEARING in Docket No. 04-CR-1016, United States of America
9 against Ronell Wilson.

10 Counsel, please note your appearances for the
11 record.

12 MR. McGOVERN: For the United States of America,
13 Assistant United States Attorney Celia Cohen and James
14 McGovern. With us is Special Agent Keltar Mui and Veronica
15 Ramirez.

16 Good morning, Your Honor.

17 MR. BURT: Michael Burt, Colleen Quinn Brady and
18 David Stern for the defendant. With us is Mayerlin Ulerio a
19 paralegal from our office.

20 THE COURT: Please be seated, everybody. Good
21 morning everyone.

22 Anything before we proceed with the next witness?

23 MR. BURT: Your Honor, just in terms of scheduling.
24 The government assured me last night that they're going to be
25 probably the entire day after I do the direct examination. We

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1 have another witness sort of waiting in the wings, but he's
2 not present in the courtroom. So if for some reason the
3 government doesn't go all day, we're going to discuss with
4 them at some point in time when we'll get our witness here so
5 that the next witness will be here. But we anticipate this
6 witness probably will take the entire session.

7 MR. McGOVERN: That's my expectation as well. His
8 direct, I'm told, is going to go to the lunch hour.

9 THE COURT: Yeah, I think that was basically -- that
10 was the sense that I got from Mr. Burt.

11 MR. McGOVERN: So I think we'll be able to fill the
12 hours after that. But if I get the sense that I'm not, I'll
13 immediately --

14 THE COURT: We're going till seven.

15 MR. BURT: Yes.

16 THE COURT: So we need to fill the time.

17 MR. McGOVERN: Okay.

18 THE COURT: And if by some unfortunate circumstance
19 we're lagging toward the end of next week, we'll just do seven
20 days instead of six. I'm just going to get it done. I've got
21 to get it done. I really do appreciate everyone's help in
22 moving this along.

23 MR. McGOVERN: That's great.

24 THE COURT: I just wanted to let you know about
25 that. The sense of urgency has been transmitted, and I know

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1 the message has been received. And you're working hard to get
2 things done, so I appreciate that.

3 MR. BURT: Sure.

4 THE COURT: Let's get going then.

5 Mr. Burt, you may call your next witness.

6 MR. BURT: That would be Dr. Gregg Olley. And, your
7 Honor, I have had premarked a binder relevant to Dr. Olley's
8 testimony. It's Exhibit F. A copy for the Court. (Handing.)

9 THE COURT: Thank you very much.

10 Step up sir, please.

11 COURTROOM DEPUTY: Sir, please raise your right
12 hand.

13 JOHN GREGORY OLLEY, having first been duly sworn, was examined
14 and testified as follows:

15 THE COURT: Good morning, sir. Please be seated.

16 COURTROOM DEPUTY: Please state your name and spell
17 it for the record.

18 THE WITNESS: John Gregory Olley. Last name is
19 spelled O-L-L-E-Y.

20 THE COURT: Very well. You may inquire.

21 MR. BURT: Thank you very much, Your Honor.

22 DIRECT EXAMINATION

23 BY MR. BURT:

24 Q Good morning, sir.

25 A Good morning, Mr. Burt.

Olley - Direct/Burt

1 Q Could you tell us your business or occupation?

2 A I am a psychologist at the University of North Carolina
3 at Chapel Hill. My primary work responsibilities are at the
4 Carolina Institute for Developmental Disabilities, which is an
5 institute within the school of medicine. And my academic
6 appointment is in the department of allied health sciences,
7 where I have a rank of clinical professor.

8 Q Doctor, next to you is a binder of material that's been
9 marked as Defendant's F. It's the smaller of the two binders
10 there.

11 A Yes.

12 Q Are you familiar with the contents of that binder?

13 A Yes.

14 Q Does that have material that is relating to your
15 testimony in these proceedings?

16 A Yes, sir.

17 Q Could you just briefly tell us what's in that binder?

18 A Well, I may need some refreshing. It is a copy of the
19 slides that we are planning to present this morning, a copy of
20 my curriculum vitae, the raw data from my adaptive behavior
21 evaluation of Mr. Wilson and the one-page table summarizing
22 the IQ scores.

23 Q And a copy of your report as well?

24 A Yes, sir.

25 Q Would you turn to the tab with your CV in it, please. I

Olley - Direct/Burt

1 think it's the second tab.

2 A Yes.

3 Q Is that CV an accurate and complete listing of your
4 qualifications and publications?

5 A Yes, it is up until the date that's indicated.

6 Q August 2012?

7 A Well, actually, this one says January 2012.

8 Q Okay.

9 And can you briefly tell us what it is you do on a
10 daily basis in your profession?

11 A Well, over the years, my focus has been almost entirely
12 on developmental disabilities, meaning autism, what used to be
13 called mental retardation we now call intellectual
14 disabilities and related chronic disabilities in children and
15 adults.

16 What I do right now, as I'm knocking on the door of
17 retirement, is to complete my obligation in Atkins cases that
18 are ongoing. I supervise a forensic psychology intern. And I
19 have release time from the University to chair our state's,
20 North Carolina's Commission for Mental Health Developmental
21 Disabilities and Substance Abuse Services. So that pretty
22 much takes up my time.

23 Q And the institute where you practice in North Carolina,
24 can you describe what that is?

25 A Yes. It is funded by many sources but is primarily

Olley - Direct/Burt

1 identified as the state's university center for excellence in
2 developmental disabilities, education, research and training.
3 That's a long-winded description, I know. But throughout the
4 country, there are 67 of such designated university centers,
5 and this is the one for North Carolina. It is also a --
6 several things, because there was a merger a few years ago.
7 It is a program that is funded to provide training and
8 leadership, education in neurodevelopmental disorders. It is
9 also a basic research program, a bench science research
10 program in many basic sciences related to disabilities.

11 Q And these university centers throughout the country, are
12 they funded through a common source, or is it a state-by-state
13 source?

14 A They are funded primarily by the -- it also changed its
15 name just recently, but what has been described as the
16 administration on developmental disabilities, which is a
17 federal source.

18 Q And is the function of these centers just teaching, or do
19 you also work with clients, patients?

20 A Yes. Well, several things. It is said that this long
21 name is centers for education, research and training. So we
22 have a clinic. We have outreach activities that are
23 contracted for a variety of services with schools, with
24 residential programs and doing a lot of training for
25 professionals around the state. And there is research,

Olley - Direct/Burt

1 although the part of it that is part of the university center
2 certainly has a very focus on practical issues. For example,
3 there's a large focus on autism and other, you know, related
4 identifiable disorders, such as fragile X syndrome.

5 Q And how about intellectual disability, how much of your
6 work at the centers is involved with people with intellectual
7 disabilities?

8 A Well, I've been there since 1988, and so my focus has
9 been almost entirely on individuals with developmental
10 disabilities, primarily intellectual disability and at various
11 ages.

12 Q When you say your focus, is that a clinical focus, is it
13 a research focus or is it both?

14 A Both. And a training focus. But, you know, for many
15 years, I worked in the clinic, and so we saw regular
16 appointments of children and adults who had presented with a
17 variety of developmental problems.

18 Q And was part of your function in that clinical setting to
19 diagnosis people with intellectual disabilities?

20 A It was primarily to do assessment. Now, the purpose of
21 assessment can be diagnosis, as I understand it to be in an
22 Atkins case and other clinical settings. It has less to do
23 with the label that's put on a person and more to do with the
24 kinds of services that would be appropriate. So identifying
25 that person's individual profile of strengths and weaknesses

Olley - Direct/Burt

1 and hoping to design appropriate services, you know,
2 educational, therapeutic, otherwise.

3 It's a center, by the way -- although I'm a
4 psychologist, it's a center with many disciplines on people.
5 Some people have come and gone over the years, but there's
6 roughly 10 different disciplines that work together to provide
7 training with the focus being on training leaders for the
8 future who are familiar with not just their field in which
9 they've gotten a degree, but in all of the related fields that
10 provide services to people with disabilities.

11 Q And does the training function of these centers focus on
12 training psychologists and other professionals how to assess
13 for intellectual disabilities?

14 A Yes.

15 Q And what is your role in that regard, the training
16 function?

17 A Well, as I said, right now, because I'm moving in the
18 direction of retirement, it is less than it used to be. I'm
19 currently supervising one forensic psychology intern, and
20 there are other interns in developmental disabilities that are
21 scheduled to work with me in the near future. But I've pulled
22 back from my direct work in the clinic because I have an
23 obligation to these forensic cases.

24 Q Okay.

25 And you said in the clinic, you've been working

Olley - Direct/Burt

1 there since?

2 A 1988.

3 Q And what did you do before 1988?

4 A I briefly was clinical director of a program located in
5 southeastern Massachusetts and also in Rhode Island that
6 was -- that provided residential services for people, mostly
7 coming out of institutions. The attempt was to get people
8 with what we were calling them, mental retardation and severe
9 behavior problems and also psychiatric disorders, out of
10 institutions and living in more community-based settings.

11 Before that, I was at the University of North
12 Carolina in another role as the training director for the
13 statewide program on autism.

14 Q And could you give the court a brief overview of your
15 educational background?

16 A Yes. I received a bachelor's degree in psychology from
17 the College of William and Mary and a master's degree in
18 general experimental psychology from Wake Forest University
19 and a Ph.D in psychology with an emphasis in what we then
20 called mental retardation from George Peabody College, which
21 is now -- it has merged with Vanderbilt University. My
22 clinical psychology internship was at the University of Kansas
23 Medical Center at Kansas City.

24 Q And are you licensed anywhere as a psychologist?

25 A Yes. I'm licensed in North Carolina.

Olley - Direct/Burt

1 Q Okay.

2 Now, since you graduated from school, did you at
3 some point in time have some research and writing interest in
4 the area of intellectual disability?

5 A Yes. I have had that interest since I've been in
6 graduate school, and I've tried to do some of several things,
7 doing clinical work and teaching and research and writing.

8 Q Okay.

9 Looking at your CV in the binder there, under
10 research and publications, when was the first time you
11 published something in the area of intellectual disability?

12 A That's a good quiz question, because I have to look. I
13 think it's approximately 1970, but I have to look.

14 1971.

15 Q Is that the article that's entitled "Behavioral
16 Comparisons of Mongoloid and Non-Mongoloid Retarded Persons, a
17 Review"?

18 A Yes, it is.

19 Q And that was published in the American Journal of Mental
20 Deficiency?

21 A Yes.

22 Q Does the field of intellectual disability have
23 specialized journals that people publish --

24 A Yes.

25 Q -- articles in the field?

Olley - Direct/Burt

1 A Yes, definitely.

2 Q And what are the main journals in the field?

3 A The American Association on Intellectual and
4 Developmental Disabilities, which, as you know, the Court
5 knows, has previous titles, has two primary journals, which
6 are the research journal, which this was the earlier -- the
7 one you mentioned is the earlier name for it. It's now The
8 American Journal on Intellectual and Developmental
9 Disabilities. And the other journal that they published that
10 is more applied research is simply called "Intellectual and
11 Developmental Disabilities."

12 Q Okay. And --

13 A Pardon me, if I can finish.

14 Q Sure.

15 A There are other organizations and other professional
16 journals that publish things related to disabilities. I think
17 the chief one is an international organization focused on
18 research on intellectual disabilities, and it publishes two
19 journals as well.

20 Q You have a section in your CV which is entitled
21 "Editorial Work."

22 A Yes.

23 Q What do you do in connection with editing journals, the
24 journals that are listed there?

25 A Currently, I'm a consulting editor on two journals, which

Olley - Direct/Burt

1 means that I'm regularly sent manuscripts that have been
2 submitted to those journals for publication, and I review them
3 and make my recommendation to the chief editor of about
4 whether they should be published and what kind of revisions
5 would be appropriate for them. And then occasionally I'm
6 asked to review articles on other -- from other journals, ones
7 that I'm not on their regular roster of reviewers.

8 Q Do you know something called "Division 33"?

9 A Yes, sir.

10 Q And what is Division 33?

11 A Well, it's a division of the American Psychological
12 Association. The American Psychological Association has, I
13 believe, 54 divisions. So there are a great many specialties
14 within psychology. And Division 33 is the division on
15 intellectual and developmental disabilities, formerly the
16 division on mental retardation.

17 Q How long have you been affiliated with that division?

18 A Oh, I think as long as I've been a member of the American
19 Psychological Association, which would be the early '70s.

20 Q Have you ever held any position in that organization?

21 A Yes. I'm a fellow in the division, and I am a past
22 president of the division.

23 Q And for what years were you the president of the
24 Division 33?

25 A It was two or three years ago. I don't remember the

Olley - Direct/Burt

1 exact dates.

2 Q Now, are you familiar with the United States Supreme
3 Court's decision in Atkins versus Virginia?

4 A Yes, sir.

5 Q And at some point in your career, did you begin writing
6 about Atkins-related issues?

7 A Yes, sir.

8 Q And can you tell us what publications you have in that
9 particular area?

10 A Well, I believe that they're noted on my CV.
11 Division 33, I believe, in 2005, formed a committee on what we
12 then called mental retardation and the death penalty. And I
13 was appointed chair of that committee by the then president,
14 and I've remained chair of that group since.

15 Q What is the function of that group?

16 A The function is to provide information that -- I guess
17 the most succinct way to say it is to provide valid
18 information to the courts in order to implement the Atkins
19 decision. Now, that can be done in a variety of ways by
20 conducting evaluations and testifying as I am today, but also
21 research and other publications, giving presentations at
22 professional organization, such as the American Psychological
23 Association.

24 Q And in connection with your work with that group, the
25 death penalty working group --

Olley - Direct/Burt

1 A Yes.

2 Q -- have you published articles which attempt to instruct
3 other professionals on how to do Atkins type of assessments?

4 A Yes. Soon after that committee was formed, the members
5 of that committee began publishing things in the publication
6 of Division 33, and first an article on the general issue,
7 what is Atkins all about, and then it was followed by a series
8 of three articles that I wrote on the assessment of adaptive
9 behavior in forensic settings. And that was followed by other
10 related publications.

11 Q Would it be fair to say that your writings in the Atkins
12 area have focused on the adaptive behavior prong of the Atkins
13 decision?

14 A Yes, sir.

15 Q All right. You have in front of you there a binder of
16 material, Exhibit B, the blue binder.

17 A Yes.

18 Q And there's a tab in the binder that says "Olley
19 Division 33." Could you turn to that.

20 Do you have it?

21 A Yes.

22 Q Could you tell us what this is?

23 A Well, this is a copy of the publications that I mentioned
24 that were published in Psychology in Mental Retardation and
25 Developmental Disabilities, and I believe it is that

Olley - Direct/Burt

1 three-part series on the assessment of adaptive behavior in
2 adult forensic cases.

3 Q And was the purpose of this article to set some standards
4 about how these assessments get done?

5 A In a sense. Although, you have to the word "standards"
6 with caution because the American Psychological Association is
7 very careful about what it lends its name to. So people are
8 free to publish things that they perceive to be best practice,
9 but that does not mean that it has gone through the rigorous
10 process that the American Psychological Association goes
11 requires in order to call something a standard.

12 Q Okay.

13 In that same binder, there is a tab called
14 "Everington Olley 2008."

15 Do you see that?

16 A Yes.

17 Q And is that an article entitled "Implications of Atkins
18 versus Virginia, Issues in Defining and Diagnosing Mental
19 Retardation," published in the Journal of Forensic Psychology
20 Practice in 2008?

21 A Yes, it is.

22 Q Did you coauthor that article?

23 A Yes, I did.

24 Q And who was the other author?

25 A Caroline Everington is an educator who is, I believe, an

Olley - Direct/Burt

1 associate dean at Winthrop College in South Carolina.

2 Q And is this an article exploring issues in defining and
3 diagnosing mental retardation?

4 A Yes.

5 Q As it was called at the time?

6 A Yes.

7 Q Okay.

8 Right behind that is another tab, which says "Olley
9 Chapter 20."

10 Do you see that?

11 A Yes, sir.

12 Q And is that an article entitled "Assessment of Adaptive
13 Behavior in Adult Forensic Cases: The Use of the Adaptive
14 Behavior Assessment System-II"?

15 A Yes. It's a book chapter on a book by the -- edited by
16 the authors of the ABAS. And --

17 Q ABAS is one of the instruments you used in this case?

18 A Yes. Yes. The adaptive behavior assessment system,
19 second edition, and this was a book that was published to just
20 provide more information about the uses of this instrument.
21 And this chapter is a reworking of that three-part series that
22 you mentioned earlier to sort of bring together in one place a
23 discussion of doing adaptive behavior assessments in Atkins
24 cases.

25 Q And this book in which this chapter is contained was

Olley - Direct/Burt

1 published in 2008?

2 A Yes.

3 Q Okay.

4 Then the next tab of that binder is something called
5 an article -- appears to be a chapter called "The Death
6 Penalty, the Courts and What We Have Learned About
7 Intellectual Disability."

8 A Yes.

9 Q And where is that published, if it is?

10 A It is published in an edited book, and I don't remember
11 the exact name of it. It has something to do with high-risk
12 individuals with intellectual disabilities.

13 Q And when was that published?

14 A This year, 2012.

15 Q Now, you have other papers in the same general area that
16 are outlined in your CV, correct?

17 A Yes, sir.

18 Q Now, have you ever testified in an Atkins hearing before
19 today?

20 A Yes, I have.

21 Q Approximately how many times?

22 A Approximately 19 times.

23 Q Have you ever -- have you ever been retained and
24 testified for the government in an Atkins hearing?

25 A Yes, I have.

Olley - Direct/Burt

1 Q And where and when?

2 A Where is in Trumbull County, Ohio. And when is
3 approximately 2007.

4 Q And did you actually testify in an Atkins hearing for the
5 government and opine that the client in that case was not
6 mentally retarded?

7 A Yes, I did.

8 Q Did you work for that same prosecutor in another case?

9 A Yes, I did.

10 Q Did you testify in that case?

11 A I did not testify. I did an evaluation and I wrote a
12 report and I went to court. And the defendant in that case,
13 against his attorney's advice, stated that he did not have
14 mental retardation, and he did not want to go forward with the
15 case. So the case was decided by the judge on the available
16 evidence. And so there was no testimony.

17 Q Were you prepared in that case to go forward at a hearing
18 at which you were going to testify the client was not mentally
19 retarded?

20 A Yes. I was sitting in court at the time and was
21 surprised at the outcome of it.

22 Q Okay.

23 Now, have you also testified on the other side, for
24 the defense in Atkins hearings?

25 A Yes.

Olley - Direct/Burt

1 Q And how many times for the defense?

2 A Well, the other 18 times, I suppose.

3 Q Now, have you been involved in Atkins cases where -- for
4 the defense, where you have not testified; in other words,
5 where you've been consulted and rendered opinions to the
6 lawyers that basically you couldn't help them on the issue and
7 you didn't testify?

8 A Yes. I've done evaluations and given the opinion that
9 the person did not qualify to have mental retardation; and,
10 therefore, I did not testify. And I've been in cases in which
11 I've done an evaluation and written a report, and the case was
12 settled before it went to court.

13 Q Now, you're familiar with a subpoena that I told you the
14 government issued for certain financial records of yours?

15 A Yes.

16 Q And let me ask you the questions that are addressed in
17 that subpoena. Number one, how much income did you derive
18 from forensic-testimony-related sources in 2001?

19 A The nature of my contract with the school of medicine and
20 the common contract for faculty members in the school of
21 medicine is that any clinical work is billed to the
22 university. So the answer to that is zero. No money went
23 directly to me as a result of that work.

24 Q And how about after 2001?

25 A The answer would be the same.

Olley - Direct/Burt

1 Q In other words, your income, whatever money is derived
2 from your work in these cases goes to the university?

3 A Yes. I'm a salaried state employee, and that income does
4 not alter as a result of my doing this work.

5 Q Okay. You said you're a licensed psychologist in the
6 state of North Carolina?

7 A Yes.

8 Q Have you ever had any sort of a disciplinary action
9 involving any issue?

10 A Yes, one. I've been licensed since 1974. So I guess
11 that's 38 years. And during that time, I had one infraction.

12 Q And what was the infraction for?

13 A North Carolina, like most states, requires that
14 masters-level psychologists be supervised in order to retain
15 their license. So it was a circumstance in which I was
16 working with a woman who was a masters-level psychologist who
17 was not actually practicing psychology at the time but wished
18 to retain her license. And so because I had occasion to meet
19 with her anyway, I met with her to fulfill that responsibility
20 of supervision. At a later time, my records for supervision
21 were audited and found that I did not provide sufficient
22 detail in my notes of what we talked about in each supervision
23 session. And so as a result, there was an infraction in which
24 I paid a fine, and I engaged in continuing education in the
25 area of record keeping.

Olley - Direct/Burt

1 Q You entered into a consent order of admitting that you
2 had "failed to maintain a clear and accurate record of your
3 supervision of Ms. R that was consistent with board
4 requirements"?

5 A Yes. That refers to the psychology board of North
6 Carolina.

7 Q And that was in 2007?

8 A Yes.

9 Q Have you had any other write-ups or disciplinary
10 infractions?

11 A No.

12 MR. BURT: Your Honor, at this time, I would offer
13 Dr. Olley as an expert in intellectual disability.

14 MR. MCGOVERN: Your Honor, may I have a very brief
15 voir dire?

16 THE COURT: Yes, you may.

17 VOIR DIRE EXAMINATION

18 BY JAMES G. MCGOVERN:

19 BY MR. MCGOVERN:

20 Q James McGovern, Assistant United States Attorney.

21 Doctor, I'm trying to get a grip on your clinical
22 experience. You testified that you've had some clinical
23 experience prior to getting involved in the Atkins litigation
24 work. Could you describe that for me? What is your actual
25 clinical work?

Olley - Direct/Burt

1 A I began and where my interest in this area began was my
2 first year in graduate school in 1966, in which I had an
3 assistanceship working in what was called the development
4 evaluation clinic. So we saw children with a variety of
5 disabilities and did testing and related assessment,
6 interviewing the parents and so on. And that got my interest
7 started, which then led to my going into a doctoral program to
8 specialize in mental retardation. And during that time in
9 graduate school, I did more testing and evaluation, and I've
10 continued to do that at various amounts in whatever setting I
11 have been since.

12 The assessment that I mentioned in our clinic, in
13 our institute where I've been since 1988, had regular
14 appointments of children and adults who presented with a
15 variety of problems, almost always involving some degree of
16 mental retardation, for which I administered IQ tests and
17 other kinds of tests and interviewed parents and worked with
18 other disciplines to make recommendations.

19 Q And are you still doing that?

20 A I am not. As I mentioned, in my pathway to trying to get
21 myself retired, I have withdrawn from doing that currently in
22 order to finish up the Atkins cases to which I'm already
23 obligated.

24 Q So your primary focus of your work right now is working
25 on Atkins cases?

Olley - Direct/Burt

1 A Yes. That and chairing the mental health commission for
2 the state.

3 Q Just focusing on the Atkins cases for a moment. Those
4 are all cases in which you've been retained to evaluate
5 prisoners or people who are alleged to have committed capital
6 crimes and determine whether or not they are mentally
7 retarded?

8 A Yes. There are some related sorts of matters, such as
9 competence to stand trial. There are several cases. But the
10 majority of them are Atkins cases.

11 Q Okay.

12 And so as you sit here today, you don't really do
13 any clinical work?

14 A Not outside of Atkins cases.

15 Q And I don't want to understate that. Essentially Atkins
16 cases are clinical work because you're doing evaluations,
17 correct?

18 A Yes.

19 Q I'm trying to be fair.

20 But your work with the institute where you were
21 evaluating people clinically, how long ago would you say that
22 you were doing that outside of Atkins casework?

23 A I would say that ended maybe five years ago. Again, it
24 gradually diminished, and I have done few of those kinds of
25 cases --

Olley - Direct/Burt

1 Q Okay.

2 A -- in the last five years.

3 Q And then you used a word with Mr. Burt there,
4 "assessments." And I'm not sure. Were you distinguishing
5 that from evaluations? Can you explain that?

6 A That's probably not a distinction worth making. I think
7 the broad notion of assessment is to find out all of the
8 related information and related to the presenting question,
9 and that may take the form of standardized tests or a variety
10 of other things.

11 Q And based on your experience and the work that you've
12 done as a clinician up until, I guess, 2007, your testimony is
13 that you're fully familiar with the standard of care for
14 evaluating people with intellectual disability or mental
15 retardation?

16 A Yes, I believe so.

17 Q Okay. And you stated that the vast amount of your work
18 has been working for defense attorneys; is that right?

19 A That's true.

20 Q In the Atkins area.

21 But that you did actually do a case for the
22 government somewhere in Ohio or somewhere?

23 A Yes.

24 Q And where is Trumbull County, Ohio?

25 A It is in northeastern Ohio, sort of north of Youngstown.

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1 It's about halfway between Cleveland and Pittsburgh.

2 Q And you did a couple of cases for the prosecutor out
3 there?

4 A Yes.

5 Q Who was that?

6 A I'll think of it when I'm not thinking of it.

7 Q That's fine.

8 A I'm not being evasive. I remember the clients. I don't
9 remember the prosecutor's name right off my head.

10 Q All right.

11 And the year of that was 2007?

12 A Yes. I believe the first one was 2007, and then the
13 second one was, oh, maybe two years later.

14 Q Okay.

15 MR. McGOVERN: I have no objection to the doctor.
16 Thank you.

17 THE COURT: All right. Motion is granted. The
18 witness is deemed an expert in intellectual disability, also
19 known as mental retardation.

20 MR. BURT: Thank you.

21 CONTINUED DIRECT EXAMINATION

22 BY MR. BURT:

23 Q Dr. Olley, what were you asked to do in this case?

24 A Most concisely stated, I was asked to evaluate or assess
25 Mr. Wilson's adaptive functioning in childhood and as near as

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1 possible to the time of the crime for which he has been
2 convicted.

3 Q And you understand, as we're going to assess in a minute
4 there are different prongs to the Atkins test, correct?

5 A Yes, sir.

6 Q Were you retained and were you focused in this case
7 primarily on the second prong, that is, the adaptive
8 functioning prong?

9 A Yes. I did not conduct any evaluation of intellectual
10 functioning.

11 Q Okay. You, however, reviewed the intellectual
12 functioning scores, I believe, that were compiled in a list or
13 a chart?

14 A Yes.

15 Q And that is in the binder that you have?

16 A Yes, I believe so. This is similar to what was in his
17 and Dr. James' report.

18 Q Okay.

19 As a result of your evaluation, did you write the
20 report that is, again, pages contained in your exhibit volume
21 there?

22 A Yes.

23 Q Okay.

24 Now, did you, as sort of the framework for
25 discussing what you did in this case, prepare some slides?

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1 A Yes, I did.

2 Q And could you just briefly outline some of the
3 definitions you're going to use in your testimony, which I
4 believe the third slide, I believe, starts with?

5 A Yes. And I believe try to be concise and respectful of
6 the judge's request that we move things along and relate these
7 things as much as possible to the current case.

8 The definition that we see here is the one that I
9 believe the Court is familiar with from the American
10 Association of Intellectual and Developmental Disabilities.
11 It is that three-part definition that you mentioned. The
12 current one for adaptive behavior by the AAIDD emphasizes
13 significant impairment in one of these three areas that are
14 noted here, conceptual, social and practical skills.

15 The other thing that's of great emphasis there is
16 that last line, "in their everyday lives," because this is
17 part of the history of the concept of adaptive behavior. This
18 is how this condition was identified generations ago, before
19 there were IQ tests. It was because people, in their everyday
20 lives, were unable to perform those responsibilities that were
21 expected of people their age. So, of course, hundreds of
22 years ago, we didn't have formal scales, but this condition
23 was skill recognized by impairments in adaptive behavior. And
24 that's why I believe it's very important.

25 Q All right. And in terms of the standard, the next slide,

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1 slide four, do you -- in this case, did you apply this
2 standard to the information that you reviewed, that is,
3 significant limitations?

4 A Yes. And I think that that is -- that phrase
5 "significant limitations" is an important part of the slide,
6 because, of course, we all have disabilities in the sense that
7 we do things poorly from time to time. So what we are looking
8 for here in order to come to a conclusion about an evaluation
9 is whether the disability is a significant one in at least one
10 of those areas and that it manifests itself in the person's
11 everyday life.

12 Q All right.

13 The next slide, slide five. Is there a way that the
14 AAIDD quantifies the standard that is to use and did you use
15 that standard in this case?

16 A Yes. There are several -- this is a bit of a wordy
17 slide, but there are several important things in there early
18 on, mentioning the use of standardized adaptive behavior
19 measures, which I did do and which Dr. Denney did as well.
20 And then again, the mention of identifying significant
21 limitations. And that significant limitation is defined,
22 similarly as it is for impairments in intelligence, to be two
23 standard deviations below the mean. And what is meant there
24 when it says "below the mean" is the population mean. That is
25 to say that the individual is compared with all individuals in

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1 the United States of his or her age.

2 Then it goes on to point out that, again, the
3 impairment is in at least one of these three areas. Or what
4 is listed as B there is a second criterion, which would be a
5 significant impairment in an overall score that takes into
6 consideration all three of these areas.

7 Then the last part -- as I mentioned, it's a busy
8 slide; there's a lot on there, but it's important -- that
9 similar to IQ tests, again, the instrument must take into
10 consideration the standard error of measurement or any other
11 factors that might qualify what that score is. And this is
12 particularly important in this case or in most any Atkins case
13 because the focus is on the developmental period and the time
14 of the crime, which in Mr. Wilson's situation is 10 years or
15 more ago. And so there is a lot of care, caution,
16 qualifications that have to be implemented. And this is
17 mentioned in the AAIDD manual. And so although they emphasize
18 the use of a standardized adaptive behavior measure, there's a
19 lot of caution about using that properly to come to a
20 conclusion.

21 Q And when the AAIDD says the instrument's standard error
22 of measure must be considered, is there a metric similar to
23 what's used with the IQ scores in terms of the range of scores
24 that you're looking for?

25 A Yes. And when tests are scored, they yield a confidence

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1 interval similar to IQ tests so that you can look at a range
2 of scores. And, you know, again, similar to IQ tests, if it's
3 at the 95 percent confidence interval, then you can be
4 95 percent confident that this range encompasses that
5 individual's functioning.

6 Q Now, you testified in the Davis case in Maryland, right?

7 A I did, yes.

8 Q And I think in that case, you said that the sort of
9 target score was a 70. Is that the score you're looking for?

10 A Well, a standard -- two standard deviations below the
11 mean of a test that has a standard deviation of 15 would be
12 70. You know, in the Davis case, all the scores were at or,
13 as I recall, below 70. So I don't recall that the discussion
14 ever came up in Davis about standard error of measurement.
15 However, certainly that concept would have applied there as
16 well.

17 Q So in the intellectual functioning prong, I think there's
18 some language that we've been through with Dr. Shapiro which
19 says that because of the standard error of measurement, scores
20 up to 75, around 75, approximately 75, would qualify. Is that
21 same metric applied in the adaptive behavior area?

22 A Yes. That's the AAIDD standard.

23 Q Now, you mentioned Dr. Denney. Did you review the
24 reports in this case that were written by other experts, both
25 the defense experts and the government experts?

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1 A Yes.

2 Q And who were the government expert reports that you
3 reviewed?

4 A Dr. Denney and Dr. Mapou. I hope I'm saying his name
5 directly.

6 Q And was there a report by a Dr. Patterson as well?

7 A I don't recall Dr. Patterson.

8 Q Okay. And of the reports by Dr. Mapou and Dr. Denney
9 that you reviewed, did they -- did either of those gentlemen
10 perform adaptive functioning testing similar to what you did?

11 A Yes, Dr. Denney did.

12 Q Okay.

13 And how about Dr. Mapou, did he?

14 A He made -- no. He made reference to Dr. Denney's
15 evaluation. The reason I was hesitating is because a portion
16 of that was a standardized evaluation of academic performance.
17 But I believe that that was done by Dr. Denney and referenced
18 by Dr. Mapou.

19 Q And what test did Dr. Denney apply in the adaptive
20 behavior area?

21 A He applied two different tests. And I've been trying to
22 figure out the rationale for them. And I think that the
23 rationale is that when evaluating a person retrospectively and
24 using an adaptive behavior scale, it's important to identify
25 what age the person was when the reporter is making these

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1 ratings. That's important because it's a norm-based
2 instrument, similar to IQ tests, and the person is being
3 compared to other people of his age. So you have to know what
4 age you're talking about in order to generate a score.

5 My understanding is that when the respondents were
6 talking about Mr. Wilson when he was below 16 years of age,
7 that Dr. Denney used the Vineland adaptive behavioral scale.
8 When the respondents were referring to Mr. Wilson's
9 functioning when he was older than 16, he used the adaptive
10 behavior assessment system, which is the same instrument I
11 used.

12 Q And you use the adaptive behavior assessment system test
13 instrument for all the people that you administer tests to?

14 A Yes.

15 Q Each of those tests is a standardized test in the sense
16 that it has a manual, such as the one I'm holding up, ABAS-II
17 manual?

18 A Yes. All of these instruments have a manual.

19 Q And there's a Vineland adaptive behavior second, second
20 edition manual. This is the instrument that Dr. Denney used?

21 A Yes.

22 Q You're familiar with both instruments?

23 A I'm more familiar with the adaptive behavior assessment
24 system because I've used it more frequently.

25 Q But you've written about both these instruments; is that

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1 correct?

2 A Yes, briefly.

3 Q The strengths and weaknesses of each?

4 A Yes.

5 Q Okay.

6 In terms of the specific deficits that you looked
7 for in this case, slide six, is this the standard you used in
8 terms of the conceptual social and practical areas that you
9 looked at?

10 A Yes. This is a brief description of what is meant by
11 each of these categories. I say brief because it is explained
12 a good bit more thoroughly in the users guide to the 11th
13 edition manual that the AAIDD published this year. But this
14 is -- this is the brief version.

15 Q Okay.

16 And is there some language in the manual which is
17 contained on the next slide, slide number seven, about
18 situations where instruments can't be used and what you should
19 do in that situation?

20 A Yes. Well, two parts to that. First, I guess assessing
21 whether it's appropriate to use a particular instrument and
22 many other qualifying questions associated with that. And
23 then if the decision after that investigation is that the
24 instrument would not be appropriate to use or, more commonly,
25 that a person, the potential respondent would not be an

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1 appropriate respondent to provide that information, then you
2 want to emphasize, well, the point that should be present
3 regardless, and that is that the decision about functioning of
4 adaptive behavior should be based upon broad sources of
5 information.

6 And by "broad" I mean, in contrast to an IQ test
7 that can be administered in an hour and a half or so and you
8 have a score, the assessment of adaptive functioning looks at
9 the individual's functioning during the developmental period,
10 because that's part of the definition of intellectual
11 disability. And you want information that comes from
12 different people who have known that person at different times
13 of his life under different circumstances at school, at home
14 and at play, relatives, friends, teachers, anyone who knew the
15 person -- well, there's another slide, and that gets on to the
16 matter of qualifications of the respondent.

17 But I should be more concise that the point of this
18 slide is that there is other information that we should rely
19 upon more than simply reporting a score.

20 Q And you used the framework, the AAIDD. Did you also use
21 the framework in this case that is set forth in the DSM, which
22 talks about finding deficits in at least two of 10 of the
23 areas set forth in this slide?

24 A Yes. And because it's important to present the
25 information as -- you know, in the form that the Court finds

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1 most valid, I wanted to make sure that all of this information
2 is available.

3 In the current DSM, the criterion is a significant
4 impairment in two these 10 areas that are mentioned. This
5 list is also the one that was used by the AAIDD predecessor at
6 the time of the Atkins decision. So it's not clear what a
7 particular court might find is the standard. So I wanted to
8 use both standards. And fortunately, the adaptive behavior
9 assessment system gives scores that can be used in both
10 standards. There are definitions of each of these 10 areas,
11 and they're included in my report. But I think that these are
12 pretty much intuitively obvious what these are getting at in
13 each of these areas.

14 Q Go back for a minute to slide number six. Could you
15 summarize your conclusions in this case in terms of what, if
16 any, areas of deficit Mr. Wilson had? And I'm just asking for
17 a summary conclusion at this point.

18 A Well, with regard to conceptuels, I believe that he did
19 have significant impairment. And we will discuss that
20 further, I'm sure. Similarly, with social, he did have, yes,
21 significant impairments in practical, although those are areas
22 that are different. And I really know haven't talked about
23 what each of these means. But practical is different in the
24 sense that it is -- these are skills that are learned not
25 through abstract concepts, but they're learned through

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1 experience and through repetition. So they're things, such as
2 daily living skills, that you don't have to understand how the
3 electric toothbrush works, you just have to be able to use it.
4 And one would expect that a person of low intelligence would
5 be able to function better in the area of practical skills
6 because they don't require any kind of abstract analysis.

7 Q Okay. So in this case, did you reach a conclusion as to
8 the practical domain for Mr. Wilson?

9 A Yes. Although his skills are stronger in the practical
10 domain, I believe they still represent a significant
11 impairment.

12 Q So your opinion is he has deficits in all these of these
13 domains, conceptual, social and practical?

14 A That's my opinion, yes.

15 Q And then skip ahead to the slide numbered eight. What is
16 your opinion in this case as to which these categories, the 10
17 set forth in the DSM, that he shows deficits in?

18 A My opinion, as expressed in my report, is that he has
19 significant impairment in eight of these 10 areas. And in the
20 other two areas, which are self-care and use of community
21 resources, what I described was mixed information; that is to
22 say, he had some competencies and some problems. But holding
23 to the standard of significant impairment, I did not feel that
24 he met that standard in those two areas.

25 Q Okay. Now, the next slide talks about the sources of

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1 information that you're supposed to be using to assess
2 adaptive functioning, correct?

3 A Yes.

4 Q And in this case, did you have -- what was your
5 information base?

6 A This is listed in one of the later slides. But in
7 general, I reviewed the documents that you provided to me,
8 which includes, well, many things that are listed in my
9 report. School records and many other records. I interviewed
10 Mr. Wilson and I interviewed 12 other individuals, who are
11 individuals who have known Mr. Wilson well during his
12 developmental period.

13 Q And did you interview the 12 individuals once or more
14 than once?

15 A Some of them, I interviewed more than once.

16 Q And what was the purpose of the reinterviews?

17 A For clarification. This appears in a later slide, so
18 forgive me. But part of the importance of doing adaptive
19 behavior assessment that involves a standard scale is the
20 determination of whether the reporter is -- meets the
21 qualification to be able to provide valid information.

22 Now, you held up earlier the manuals for two of
23 these adaptive behavior scales, and they state pretty
24 extensively what the qualifications are for a person to be
25 able to validly provide information. And this is an even more

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1 challenging standard, as I mentioned, because it's
2 retrospective, so the person has to be able to remember the
3 person's functioning some years ago.

4 In addition -- I'm not sure if we're going the same
5 direction here. But my evaluation was to look at those 13
6 people, including the defendant, and make a determination
7 whether those people were -- met that criterion stated in
8 these manuals, also stated in the AAIDD manual and the
9 criteria that I stated in my report. It was my conclusion
10 after interviewing these people that four of those 13 people
11 would be able to provide information that would be useful in
12 an adaptive behavior scale.

13 And I don't want to keep -- I think I'm rambling a
14 little bit.

15 Q Four of the 13 you interviewed, you actually administered
16 the instruments to. And did you obtain information from the
17 other folks?

18 A Yes. And because the person cannot recall the
19 information that would be a valid response to well over a
20 hundred items on an adaptive behavior scale does not mean that
21 the person does not have valid or useful information to
22 provide. So those other individuals, or at least most of
23 them, I felt had useful information for me and could describe
24 some circumstances of their living with Mr. Wilson. That was
25 very informative about areas where he may have deficits, even

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1 though they could not give me a standardized score. This
2 comes back to the point earlier about get information from
3 many sources and then use clinical judgment to determine from
4 all of those sources what a conclusion would be.

5 Q In the next slide -- does the manual recognize that these
6 instruments you're talking about are imperfect measures of
7 adaptive functioning?

8 A Yes. I think that the second bullet on this slide
9 indicates that clearly.

10 Q And therefore, that you have to look at these other
11 services, medical history, school records, et cetera, correct?

12 A Yes.

13 Q Okay.

14 Are there certain key points that you applied in
15 this case to your analysis of Mr. Wilson's adaptive
16 functioning?

17 A Yes. And I can say these, I think, succinctly because
18 they come from the AAIDD manual. But there are some of them
19 that are particularly germane to Mr. Wilson's situation.

20 The first one is very important, and that is that
21 the concept of adaptive functioning is about a person's
22 typical community functioning. And typical means what he does
23 on several occasions across time. It does not mean picking
24 out an area where he was either impaired or doing well in
25 isolation and giving that more validity than it deserves. So

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1 this is the reason to gather information over time, the point
2 of view of many people under different circumstances, and also
3 to rely upon records for that purpose.

4 Q And when you say "gather information over time," I have
5 an exhibit here that --

6 MR. BURT: Your Honor, I'm referring to Government
7 Exhibit 51. I do not believe it's been moved into evidence.

8 THE COURT: Yes, it has.

9 MR. McGOVERN: Thank you.

10 MR. BURT: Thank you. May I approach the witness?

11 THE COURT: Sure.

12 MR. BURT: Thank you.

13 BY MR. BURT:

14 Q I have a chart here that the government compiled, which,
15 to orient you, shows the periods of time in Mr. Wilson's life
16 when he was incarcerated.

17 A Yes, I see.

18 Q Up to the present time.

19 A Yes. I have not seen this before, but I understand.

20 Q And when you say "gather information across time," you
21 notice that the chart does not include zero to 10. It sort
22 ever starts at 10 years. Is this period that's not on the
23 chart an important period of time for assessing adaptive
24 behavior functioning?

25 A Yes. By definition, functioning in the developmental

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1 period, meaning birth to 18, is necessary to assess.

2 Q Is that typically the focus; in other words, what is the
3 typical behavior in that developmental period?

4 A Yes, definitely.

5 Q Okay.

6 What were the other key points that you used in this
7 case?

8 A The second one, that adaptive skill limitations coexist
9 and are not outweighed by strengths. You know, we are all
10 human, and we have our relative strengths and weaknesses.
11 Indeed, people with mild intellectual disabilities aren't the
12 same. The point about not being outweighed is that the
13 assessment of adaptive deficits is an assessment of deficits.
14 In other words, if you find that the person has a deficit and
15 in a typical setting over the developmental period, not an
16 isolated circumstance, then you can draw a conclusion about
17 that that deficit exists. If the person has some other
18 relative strength that doesn't -- it doesn't outweigh -- in
19 other words, it's not like a basketball game or who gets more
20 points wins. If the person has identified deficits, then --
21 and they meet the standards that we have just talked about,
22 then they would qualify under the standard.

23 Q Okay.

24 And the third key point that you used in this case?

25 A The context of community environment is not custodial

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1 environments is to say that typical community functioning
2 means the community, which is to say where the people of the
3 individual's same age would live and work and play and have
4 friends and so on. Whereas custodial environments are, by
5 definition, limited in the person's options to engage in
6 adaptive functioning.

7 Now, this is not to say that one can't learn
8 something valuable from looking at those custodial
9 environments. And, you know, as indicated in this document --

10 Q "This document" being Exhibit 51?

11 A Yes, sir.

12 -- Mr. Wilson was in residential programs, and we
13 have records from those residential programs. But the focus
14 is on how one typically functions in his or her community.

15 Q Let me give you a hypothetical. Say someone's in a
16 custodial or a residential setting, and they do extremely
17 well, no problems. Does that tell you anything about how they
18 adapt in the free world, the open community?

19 A I don't know that I would say it tells you nothing. You
20 would have to be extremely cautious. The purpose of a
21 therapeutic program, of course, is to create the environment
22 in which the individual would function at his best or at least
23 improved. So if a person goes to a therapeutic setting and
24 performs well, then the therapeutic setting is doing the job.
25 But it does not mean that the person would not have a typical

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1 impairment if he were in a community setting.

2 Q And how about on the other side of the equation, which is
3 the person is in a residential or custodial setting and they
4 don't do well. Does that tell you anything about how they are
5 going to operate on the outside?

6 A Well, I think that's more informative, if, for example, a
7 person with intellectual disability typically functions better
8 a setting that has structure. And what I mean by "structure"
9 is clear expectations, and the expectations are reasonable
10 ones within that person's skill area. So if they are in such
11 a setting that's structured and individualized and has demands
12 that are reasonable for that person and the individual still
13 exhibits deficits, then that's noteworthy.

14 Q And how about in this case, can you give me an example
15 where that applies, either side of the spectrum?

16 A Well, I think that the two that come to mind is when
17 Mr. Wilson was at Elmhurst, which is a residential psychiatric
18 setting, he certainly had some problems noted in his records,
19 but he also had experiences of doing well. I mean, he learned
20 some things. You know, he was taught basic self-care skills
21 and other things. And that's the purpose of a setting like
22 that. So I think that that's informative, to look at his
23 records.

24 Later in his teenage years, when he was at
25 Brookwood, which is not -- my understanding of its function is

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1 not, you know, purely a punitive incarceration, but it also
2 has a good strong therapeutic element to it. When he was at
3 Brookwood, he did learn some things, and he showed improved
4 behavior in some areas.

5 So both of those times, although they were places
6 where his behavior was limited -- you know, you can't live on
7 word and learning to take the bus. Nevertheless, we can learn
8 some useful things by looking at his records from this period.

9 Q Okay.

10 Now, how about the fourth key point that you relied
11 on in this case?

12 A Self-reporting. There is a substantial body of research
13 literature on interviewing people with intellectual disability
14 and their self-report. And in a nutshell, it's easy to get
15 the wrong information or invalid or misleading information by
16 self-report. So it should be engaged in quite cautiously.
17 Similarly, the information from family members should be
18 viewed with caution. That's not to say they should not be
19 interviewed, because I think they have valuable information.
20 But this is where clinical judgment, which is a procedure that
21 is described quite fully in the AAIDD manual -- where clinical
22 judgment comes into play is taking all of this information and
23 determining a valid conclusion.

24 Q Okay.

25 Now, within each of those four key points that you

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1 relied on here, those are all backed up by language in the
2 manual, correct?

3 A Yes. I tried to present them concisely here.

4 Q The next slide just is what's in the manual about this
5 concept of typical, not maximum, behavior. That is, what the
6 person typically does rather than what the individual could do
7 or could -- can do or could do is what you're looking at.

8 A Yes. And I think that that last section about rather
9 than what the individual can do or could do is important in
10 any case but especially important in Mr. Wilson's case,
11 because this statement and others from AAIDD clearly indicate
12 that adaptive behavior is about behavior. It's about
13 performance. It's about what the person does, their typical
14 performance. It is not about potential. It's not about what
15 he might do or what he could have done under other
16 circumstances or what he would be expected to do because other
17 children are doing it. And that kind of speculation does
18 exist in Mr. Wilson's record, and I think that it should be
19 identified and looked at very cautiously when teachers or
20 people doing psychological evaluations say, well, you know,
21 his score really should be higher because he's got more
22 potential. That is not the way an adaptive behavior
23 assessment is done according to these standards.

24 MR. MCGOVERN: Objection.

25 THE COURT: What's the objection?

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1 MR. McGOVERN: The objection is to the response --
2 I'm sorry, to the question. He's talking about matters of
3 potential and comments from people in the record about the
4 potential of this person to do better. And the question was
5 phrased in the area of adaptive functioning, and the answer
6 was totally unresponsive. It was talking about the IQ
7 intellectual prong.

8 THE COURT: Was it your intention to discuss the IQ
9 prong of the analysis or are you -- or was it your intention
10 to discuss in that answer the adaptive functioning prong of
11 the analysis?

12 THE WITNESS: Thank you, Mr. McGovern. I should
13 limit it to -- I mean, the comments were made in both
14 contexts. My answer should be limited to comments about his
15 potential adaptive functioning.

16 THE COURT: All right. I'll allow it for that
17 purpose.

18 MR. BURT: Thank you.

19 THE COURT: Thank you very much.

20 MR. McGOVERN: Thank you.

21 BY MR. BURT:

22 Q And Doctor, you're referencing various notations in the
23 record at various points in time where somebody says he has
24 potential or he's capable of more?

25 A That was my reference, yes.

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1 Q And one thing to contrast your perspective from the
2 people who were writing those comments. Some of those were
3 made when he was as young as six years old, correct?

4 A Yes.

5 Q And those folks didn't have the advantage of seeing how
6 it played out after Mr. Wilson left their custody or
7 confinement, right?

8 A Yes. I think my caution and I think the AAIDD caution
9 has to do with speculations about how the person would do
10 under other circumstances.

11 Q And similarly, if you're administering one of these
12 instruments, is the focus when you're asking -- the
13 instruments, which we'll get into, have various questions
14 asking somebody to assess behavior, right?

15 A Yes.

16 Q Is the focus of those instruments what Mr. Wilson was
17 capable of doing? Is that the way the instruments are framed?

18 A No.

19 Q How are they -- just as an example, how is the inquiry
20 framed?

21 A The statements in any of these adaptive behavior measures
22 are statements of a particular action and perhaps at a certain
23 level. For example, reads and comprehends material at at
24 least the fourth-grade level would be an example. And then
25 the respondent is to indicate whether, in fact, the individual

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1 did that, not whether he would be potentially capable of doing
2 it.

3 Q All right. And is that an important distinction in
4 assessing not only your adaptive functioning testing but also
5 Dr. Denney's?

6 A Yes.

7 Q And why is that in this particular case?

8 A Well, because I think one has to be very careful in how
9 the information is presented to the respondents to assure that
10 it is presented as objectively as possible and that there is
11 no hint of responding to it in terms of potential but simply
12 in terms of did he do this at the age that we're talking
13 about.

14 Q Not whether he could have done it?

15 A Correct.

16 Q Okay.

17 The next slide, 13, just restates, I think, the
18 point you've already made. Significant limitations are not
19 outweighed by potential strengths, correct?

20 A Yes.

21 Q And the next slide is a little bit different, which is in
22 those three areas that you talked about, conceptual, practical
23 and social, there are various things listed within each of
24 those domains, correct?

25 A Yes.

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1 Q Like five or six different things to look at?

2 A Yes.

3 Q If someone has a limitation in a couple of those
4 sub-areas but has strength necessary others within that
5 domain, what is the decision in terms of whether the person
6 would still qualify as being limited?

7 A Well, coming back to what we said earlier, it would be a
8 significant impairment. Looking at, for example, conceptual.
9 Looking at the broad category of things that fall under
10 conceptual, does the person have a significant impairment as
11 determined -- as identified by two standard deviations below
12 the mean.

13 Q For instance, in that social category you have, the
14 language encompasses interpersonal skills, social
15 responsibility, self esteem, follows rules, obeys rules,
16 avoids being victimized and social problem solving. Do you
17 need deficits in every one of those in order to qualify for a
18 social deficit?

19 A No. But that's where a thorough evaluation and the use
20 of an adaptive behavior scale can be helpful.

21 Q And the manual on the slide 14 says "individuals may have
22 capabilities and strengths that are independent of their ID,
23 for example, strengths in one aspect of an adaptive skill in
24 which they otherwise show an overall limitation."

25 A Yes. And people with disabilities, you know, it's well

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1 documented to have isolated skills that are quite impressive.
2 I think of a young man who I evaluated in our clinic some
3 years ago who was amazingly good -- and there are other people
4 who have this skill as well -- at finding his way from place
5 to place. So for example, our clinic was in the hospital, and
6 I walked him to the cafeteria one way, through all the
7 labyrinth of hallways. We came back from the cafeteria in
8 another route. And later that afternoon, he took his mother
9 on exactly the same route and remembered it after having seen
10 it once. Now, this child had a very low IQ. So that skill,
11 remarkable though it was, did not offset his significant
12 impairment in other areas.

13 Q In the next slide, do people, especially at the higher
14 end of the IQ scale, who nevertheless qualify as intellectual
15 disabled, tend to have more strengths than, say, people who
16 are moderately impaired?

17 A Yes. And this term, persons who have ID -- persons with
18 ID who have higher IQ scores is, quite honestly, an attempt by
19 AAIDD to avoid using the term "mild intellectual disability,"
20 because mild -- you know, Dr. Shapiro may have discussed this.
21 But mild certainly can be misleading because it's still a
22 significant impairment. So here you're talking about people
23 who are similar to Mr. Wilson in that their disability is not
24 readily identifiable. And that's the important reason for
25 doing a thorough evaluation, because he is not like a person

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1 with a syndrome, where if you saw that person in the grocery
2 store, you would immediately recognize their disability.
3 That's not the case for individuals with higher IQ scores.

4 Q Such as Mr. Wilson?

5 A Such as Mr. Wilson.

6 Q Okay.

7 And is there a recognition of people who were above,
8 say, 75 -- around 75? Did those people who were above that
9 mark used to be called borderline?

10 A Yes.

11 Q And next slide, 16, is there any clear delineation in
12 terms of adaptive behavior between somebody's who is
13 characterized as borderline, that is, who's above, higher
14 scores than 75, and people who are below?

15 A Well, there are differences. I suppose that's why we
16 have Atkins hearings, that people who are the defendants in
17 Atkins hearings fall into this area where the scores are not
18 so obvious, and it requires a more thorough evaluation to make
19 that distinction. But I think the importance of this slide
20 and the statement by the AAIDD is that there is a great deal
21 of overlap.

22 Q Okay. The next slide, 17, just gets at this idea, does
23 it not, that we're looking at community environments, not
24 custodial environments?

25 A Yes. And it gives some examples there toward the end of

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1 what are meant by that, homes, neighborhoods, schools and so
2 on.

3 Q Slide 18, is there a more specific sort of guideline on
4 custodial behavior?

5 A Yes. There are a couple -- brief though this slide is,
6 there are a couple of important points here. One is, the
7 first that's mentioned, not based on the person's street
8 smarts. And I think that's important to mention because I
9 believe the term was used in Dr. Denney's report. And street
10 smarts, of course, is not a term that has any scientific
11 definition or validity. And I think it's important to clarify
12 it because I don't want -- I'm not sure this is what
13 Dr. Denney intended, but it certainly seems the implication in
14 his report that, okay, he does have these impairments which we
15 can see, but they're somehow outweighed by his street smarts
16 and whatever that might be. And what it doesn't mean is
17 adaptive criminal behavior is shown here, because by the AAIDD
18 standards, that is a contradiction because in order to have an
19 impairment in the social area of adaptive functioning, one of
20 the standards is not violating rules and laws. And a person
21 who does that by engaging in criminal activity can't then be
22 considered to be doing some adaptive. So that's why there's a
23 lot of useful information in the slide. The others, of
24 course, excluding the person's performance in jail or prison.
25 Q So I think there was a question yesterday about, well,

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1 couldn't Mr. Wilson -- wasn't he employed -- I forget the
2 exact terminology, but it was something along the lines of
3 well, what if somebody sells drugs, doesn't that indicate that
4 they have some work skills.

5 A Well, work is one of those 10 areas that was in an
6 earlier slide that was identified as the DSM criteria. And I
7 think that work is a very important and interesting area to
8 examine for Atkins clients. But, as you know, work in this
9 context involves a lot things. It involves being able to have
10 the will -- the experienced to give yourself work skills, and
11 it involves identifying something about your work interests
12 and capabilities. It involves the skill to be able to seek
13 out work in an employable setting that, you know, is suitable
14 to the individual. It involves the skills of being able to
15 fill out an application, go for a job interview and present
16 yourself successfully. All of these things leading up to
17 actually performing the work. All of these things that I
18 mentioned are things Mr. Wilson had been demonstrating
19 repeatedly during the developmental period not to be able to
20 do.

21 So if you simply hand the person a job and say do
22 it, it doesn't test for any those other skills that I
23 mentioned that are the things that would be necessary in order
24 to obtain a job in a community setting.

25 All that, of course, doesn't -- you know, was in

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1 addition to the main concern that work in a custodial or a
2 restricted setting would have all the limitations of trying to
3 adapt -- assess any adaptive functioning in any restricted
4 setting.

5 Q You said that one of the key points you're relying on in
6 this case was to view self-reports and reports of family with
7 caution. Is that because people generally are biased in
8 trying to make themselves look retarded? And this is slide
9 19.

10 A Well, it's a couple of things. The first thing to which
11 I was referring is that due to the communication and social
12 and communication -- social communication limitations of a
13 person with low intelligence, communication can be confusing
14 and misleading under any circumstances. So you have to be
15 really careful in how you ask the question.

16 Several of Mr. Wilson's relatives pointed out how
17 you have to break the question down in its components and
18 simplify the question in order to get accurate information.
19 So part of the problem is how you ask the question, and how
20 you ask the question can lead to accurate or to misleading
21 responses.

22 Then the second part is the one to which you
23 referred, and that is the well-documented characteristic of
24 people of low intelligence to want to present themselves as
25 positively as possible. A person with very low intelligence

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1 would not be sophisticated enough to recognize how different
2 he is from the people around him and to be embarrassed by
3 that. Mr. Wilson, on the other hand, is sophisticated enough
4 to recognize his own limitations, especially his academic
5 limitations and, as reported to others, his embarrassment
6 about those things. So there is certainly a motivation. And
7 one could argue it either way, as I think you were implying,
8 that the well documented cloak of competence, which is what's
9 referred to in this slide, would argue for a person with
10 intellectual disabilities to want to look good.

11 And I emphasize this book because it's a classic in
12 our field, even though it was done several years ago.
13 Dr. Edgerton is a very well-known anthropologist, who studied
14 a large number of people with mild intellectual disability
15 living in the community and how they coped with that. I mean
16 he discovered a number of things that are still quite valid
17 today. This rather artful term "the cloak of competence" that
18 he used refers to this desire to look good, to put on a cloak
19 of competence so that you appear to be capable to others. And
20 I think that there are many examples in my interviews of
21 Mr. Wilson's desire to do this.

22 Q And how about in your -- you interviewed Mr. Wilson
23 yourself, correct?

24 A Yes.

25 Q And just in general, did he present a picture of someone

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1 who is trying to establish himself as mentally retarded or
2 intellectual disabled?

3 A No, not at all. In my opinion -- and this is what I said
4 a moment ago, that the bias that you referred to could go
5 either way. And the logical, from our point of view, as
6 people of presumably greater intelligence, we would say that,
7 of course, a person would have want to present himself as
8 impaired in order to avoid the death penalty. And that was
9 certainly argued in the minority opinion of Atkins, and it's
10 certainly quite logical that one would do that. The cloak of
11 competence is a reminder that the desire to look like a normal
12 person is a very, very strong one, even in the face of the
13 death penalty.

14 And my impression when talking to Mr. Wilson is when
15 I said, now, I want you to tell me the truth and I want you to
16 do your best on anything they ask you, he took that literally,
17 and he was compliant with that. He was not, in my opinion,
18 faking in any way. And I believe that in Dr. Denney's
19 evaluation, he administered some instruments which were
20 intended to identify faking or malingering. And by that
21 standard, he did not appear to be faking bad either.

22 Q How does the cloak of competency -- cloak of competence
23 concept apply to family members, if it does?

24 A I believe that it does because, you know, in talking to
25 family members, again, I always have a bit of an introductory

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1 discussion about the importance of accurate information and
2 that the -- that what is sought is the truthful information as
3 they remember it. And I have not -- there's only one instance
4 in which I can recall a person faking bad, and that was in
5 that one case that I testified for the prosecution in Ohio.
6 In other instances, I find family members, they're proud of
7 their family. They don't want to embarrass their family.
8 They certainly don't want the newspapers to say this person
9 has mental retardation. So I think they tend to answer
10 honestly.

11 Q Next slide. Does the manual recognize that there is a
12 tendency on the part of family members to -- not to establish
13 but rather to attempt to avoid the diagnosis of intellectual
14 disability because of the stigma attached to it?

15 A Yes. That is the -- both of those statements there
16 address that point.

17 Q In this case, did you get any sense that the family
18 members and friends of Mr. Wilson were attempting to over
19 paint a picture of him being disabled for the purpose of
20 convincing you that he was intellectually disabled?

21 A No, they did not.

22 Q Was it just the opposite tendency? How would you
23 characterize it?

24 A I think it was an honest tendency. I think that the
25 family members, of course, were not all the same. And they

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1 remembered people -- they remembered Mr. Wilson at different
2 times and under different circumstances. So some of them
3 honestly pointed out how they just didn't remember or they
4 hadn't spent enough time with Mr. Wilson or, for whatever
5 reason, they couldn't render a judgment, and they basically
6 said, no, I saw him playing, he was a child, and I didn't see
7 anything unusual about that. And then in other instances,
8 they gave specific examples which I noted in my report of
9 areas of deficit.

10 Q Would you go to slide 23, which is right there.

11 In this case yesterday and I'm sure today, there's
12 going to be a lot of questioning about Mr. Wilson's verbal
13 behavior, possibly his criminal behavior. What is the
14 relevance of that to your opinions in this case?

15 A I have tried to conduct evaluations and come to an
16 opinion with the AAIDD standards in mind. And therefore, this
17 standard to not consider past criminal behavior or verbal
18 behavior is one that I used in my decision making.

19 Q Now, in this case, you -- have you been informed that
20 there are approximately 7,000 pages of E-mails that involve
21 Mr. Wilson corresponding with other people while he was
22 incarcerated?

23 A Yes, I have.

24 Q And have you also been informed that there is a DVD of
25 recorded telephone calls that involve Mr. Wilson's

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1 communications while he's -- since he's been arrested?

2 A Yes, I'm aware of that.

3 Q Have you reviewed or placed any weight on that material
4 at all?

5 A I've reviewed some of the E-mails because they were made
6 available to me. But I do not place weight on either of those
7 sources because they are not in keeping with this standard for
8 what is valid sources of information assessing adaptive
9 functioning.

10 Q Okay.

11 In the area of intellectual functioning, that prong,
12 there is a concept in the next slide, 24, about dual
13 diagnosis. Are you familiar with that concept?

14 A Yes.

15 Q And that's set forth here. There is no exclusion
16 criteria. Make the diagnosis regardless of and in addition to
17 the presence of another disorder?

18 A Yes. And that is important because it is a common
19 dispute in Atkins cases as to whether the diagnosis of some
20 other condition would be incompatible with the diagnosis of
21 intellectual disability, and the standard clearly makes the
22 point that a person can have an intellectual disability and
23 have any other disability that is in the DSM at the same time.

24 Q Let me give you an example. And this can affect your
25 evaluation of adaptive behavior, correct?

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1 Bad question. Let me rephrase it.

2 Say someone has two disorders, intellectual
3 disability and antisocial personality disorder. You're
4 familiar with those two disorders, right?

5 A Yes.

6 Q Okay.

7 A symptom of both disorders is misbehavior, can be,
8 correct? Failure to follow rules --

9 A Okay.

10 Q -- of society?

11 A Yes.

12 Q That is associated with the intellectual disability?

13 A Yes. In that it is one of the criteria for impairment
14 under the area of social behavior.

15 Q Okay. And it could also be a symptom of another
16 disorder, antisocial personality disorder, conduct disorder
17 and things like learning disabilities, correct?

18 A There are overlaps, yes.

19 Q Okay.

20 So what you do -- when you're assessing adaptive
21 behavior and you see failure to follow rules, can you say,
22 well, that failure to follow rules can be attributed to a
23 conduct disorder or some other disorder and, therefore, we
24 don't count it as part of adaptive deficits?

25 A No, it doesn't work that way this. There's no need to

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1 attribute anything. An intellectual disability is simply a
2 category. And we look at impaired functioning in the
3 designated areas. And if that impaired functioning is
4 present, then we can say this individual falls into this
5 category. But as it is with, you know, any aspect of the
6 diagnosis, you don't have to have a cause for it. And to say
7 that it's caused by this diagnosis rather than intellectual
8 disability, they are not incompatible.

9 Q Okay. Next slide. Is it recognized that your adaptive
10 functioning can be influenced by a lot of factors, personality
11 factors, motivation factors?

12 A Yes.

13 Q Next slide, 26. Is there some recognition that one's
14 culture can influence one's behavior?

15 A Yes. With some caution that I believe is noted there.
16 Certainly, evaluations are done for many purposes, and a more
17 common purpose of an evaluation is to be able to design
18 appropriate services for that person. And appropriate
19 services, of course, should happen in a cultural context
20 that's appropriate for that individual. Another purpose and
21 the one that is appropriate to Atkins cases and which is noted
22 in the AAIDD manual is diagnosis, which is more of a
23 black-and-white does he meet the criteria or does he not. And
24 in that case, as this comment indicates, it's important to not
25 be looking at cultural factors as if they somehow would wipe

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1 out the significance of impaired functioning.

2 Q Let me ask you a hypothetical. Say someone comes from a
3 particular culture. We'll use the African-American cultural
4 context just as an example. And you interview people and they
5 say, well, this individual's behavior is not abnormal within
6 our culture. Maybe according to the guidance of another
7 culture, but within our culture, it is not abnormal. How do
8 you judge that situation when you are assessing adaptive
9 behavior? Is that an example of you must consider the
10 cultural context?

11 A When you use the term "abnormal," I think that might take
12 us into a slightly different direction than what we intend.
13 Abnormal implies a psychiatric disorder. What we're looking
14 for is a deficit in performance.

15 Q Right.

16 A And as I noted at the very beginning of this discussion,
17 the standard in the norm-based evaluation is everyone in the
18 United States who is of similar age to that person. So in
19 that case, we would be taking into consideration how the
20 person functions relative to others in the United States, not
21 relative to any other people of a particular culture or -- you
22 know, some people have made comparisons to other inmates and
23 said, well, he's not impaired relative to inmates on his cell
24 block. Well, that's an extremely small norm base to make any
25 comparisons to. The appropriate base is the individuals in

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1 the United States of the same age.

2 Q And in the people that you interviewed in this case, was
3 the general -- was anybody giving you the message that, well,
4 Mr. Wilson's behavior is normal behavior within our culture?

5 A I never heard that stated.

6 Q Was it, in fact, just the opposite, that even within our
7 culture, we recognize that he had limitations?

8 A Yes. And that -- of course, that's the framework that a
9 family member would have. They don't know all of the
10 children, all the 10-year-olds in the United States. They
11 know the other children that they know in their family or when
12 my other child was 10 years old. And that's their framework.
13 So when they say he was slower to acquire certain skills, I
14 take that to mean that relative to other children I have
15 known, he was slower, and presumably that means other children
16 that I have known within my culture.

17 Q I take it the purpose of this language in the manual is
18 to avoid a situation where somebody is saying, well, the
19 deficits he had are because he comes from a ghetto or because
20 he's an African-American kid, the standards are different?
21 You're not supposed to -- is that a correct --

22 A Well, yes. And the danger is that it would overshadow or
23 minimize an actual disability. In other words, if the purpose
24 of our evaluation is to get appropriate services for the
25 person, then we would fail to identify that person as someone

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1 in need of services, which would not be doing justice to that
2 individual.

3 Q Now, have you been involved in Atkins cases, or read
4 about them, where experts are saying, well, we'll giving a
5 correction in his score on the adaptive behavior scale because
6 of his race or culture?

7 A Yes.

8 Q Is that, slide 27, an appropriate thing to do?

9 A It is not. And in the particular case that comes to mind
10 when you mention that, the judge strongly spoke against the
11 expert who advocated doing that, and that particular expert
12 later was reprimanded by his state psychology board for
13 engaging in such practice and was prohibited from using such
14 practices in the future. So I think it's a well-established
15 standard that you don't get some kind of extra points for
16 being from a minority culture.

17 Q And did this issue come up in the Davis case? This is
18 the next slide?

19 A Yes. It was put forth by Dr. Antell, who was the expert
20 for the government in the case.

21 Q And basically what was the response?

22 A The response of the court is on the next slide. That
23 it's simply incorrect, that the DSM states that the diagnostic
24 criteria do not include an exclusion criteria.

25 Q Now, Doctor, in this case, you reviewed what's called the

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1 GOV binders, the 10,500 pages of social history records?

2 A I cannot promise that I read every word of those 10,500
3 pages, but yes, I reviewed them.

4 Q It was made available?

5 A It was made available. That's a better phrase.

6 Q And did you use your judgment in terms of what you
7 focused on and what you considered important?

8 A Yes.

9 Q Are there some standards in the profession for what are
10 the sources you should be relying on?

11 A Yes, indeed.

12 Q And slide 30. Is there a hierarchy in terms of what is
13 considered the most reliable and the things you'd like to look
14 at in order to make assessments and which you used in this
15 case?

16 A The hierarchy that are on these slides is the Gregg Olley
17 hierarchy. And I need to recognize that, but numbering these
18 is a matter of my making my point, although I think it's well
19 supported. But I don't mean to imply that these numbers would
20 not be something that would be debated by others. It's merely
21 a convenience to go through these, and I'll try not to dwell
22 upon them.

23 But the standard as we discussed earlier in adaptive
24 functioning assessment is to gather information from many,
25 many sources. But not all sources are equally valid. So when

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1 all of this information is available, it's important to be
2 able to exercise clinical judgment to conclude what is valid
3 and what is not. So I mention all of these because they will
4 probably -- many of them will come out in our discussions
5 today, and I'd like to put forth what I believe are the best
6 standards.

7 Q Best sources and what weight you put on those sources?

8 A Yes, sir.

9 Q Now, in some cases that you've worked on, is the
10 documentation better than in others?

11 A Oh, yes.

12 Q And in this case, how would you characterize the extent
13 of documentation of Mr. Wilson's deficits prior to the age of
14 18?

15 A I think that they are extensive from several sources,
16 which makes me more confident in rendering a decision about
17 them.

18 Q All right. And let's look at the sources. First of all,
19 school records. Did you have available school records? And
20 what was the importance of those in terms of how much weight
21 you placed on them?

22 A Yes. And immediately above that on the slide, it
23 indicates that archival information may be seen as more
24 objective. And the reason for mentioning that is that
25 archival information, such as school records, were gathered at

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1 an earlier time, certainly prior to the time of the crime,
2 that the person who entered these records presumably had no
3 bias, and it was done as reasonably objectively as possible.
4 So when we look at records from childhood, they tend to be
5 important. So as you mentioned, there are school records.

6 And the reason it says in parenthesis "may require
7 interpretation from a local school official" is that I have
8 read and I'm sure many of you have read, many, many school
9 records, and they are very different. The nomenclature that's
10 used in one school system or even one school or one teacher
11 can be different. So it's useful to be able to interpret
12 those to say, for example, if this person is in a special
13 education class and gets a B on his report card, is that the
14 same standard as a B if he were not in a special education
15 class. So there are many of those qualifications that are
16 necessary.

17 But the things that are further bulleted there are
18 things that are available in this case. Achievement testing.
19 His grades in school. The IEP for special education is useful
20 because it lists the goals and objectives, which is to say
21 these are the things that the person is now working on. So
22 that's a good objective standard for school achievement.
23 Teacher comments can be helpful and sometimes misleading, I
24 suppose. Whether he was engaged in extracurricular
25 activities, which is not very present in Mr. Wilson's case.

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1 But all of these are worthy of taking a look at.

2 Q And of these sources, what did you have available in this
3 case? What did you learn from them that was helpful to your
4 analysis?

5 A I think in general -- and this is actually stated, I
6 believe, in Dr. Denney's and Dr. Mapou's report as well, so I
7 think it's an area of not disagreement. And that is that
8 Mr. Wilson started out in kindergarten below others of his age
9 academically and that over the course of time, throughout the
10 developmental period, he became further behind relative to the
11 performance of his peers. And that's supported by all of
12 these -- with the exception of extracurricular activities, I
13 think that that conclusion is supported by all of these
14 sources.

15 Q And do the records document that he was placed in special
16 education at a certain age and kept there for a period of
17 time?

18 A I believe that he was referred for special education in
19 first grade, which is unusual in my experience, and stayed in
20 special education throughout his school history.

21 Q Now, in assessing the significance of those placements,
22 do you place a lot of weight in whether the person was
23 actually determined to be intellectually disabled within the
24 school system?

25 A You mean if they were classified that way as opposed to

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1 classified another way?

2 Q Right. In other words, say you have somebody who's in
3 special education and they were not classified as
4 intellectually disabled. In terms of your assessment of
5 adaptive behavior, does that make a difference?

6 A I think I would want to have more information. Bearing
7 in mind that the school evaluation is different from the
8 evaluation that is being discussed here today. The purpose of
9 the school evaluation is to put the person, the student in the
10 most individually appropriate curriculum. And, you know, in
11 my view, there is considerable influence about what -- what
12 curriculum the person -- or what label the curriculum would
13 have that may be quite independent of the person's
14 functioning. And if I may elaborate on that.

15 Q Sure.

16 A I think that the concise story, which in Mr. Wilson --
17 Dr. Shapiro may have made reference to yesterday, so I'll try
18 to be concise. But since perhaps the early '70s, the number
19 and proportion of students who were in classes for what used
20 to be called educable mentally handicapped, which is roughly
21 equivalent to mild intellectual disability, that number has
22 gone down. At the same time, the number of and proportion of
23 students classified as learning disabled has gone up. There
24 have been considerable pressures -- and I'm not just talking
25 about New York, I'm talking about the United States -- to not

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1 categorize children from minority backgrounds as having mental
2 retardation. A mental retardation label, as we discussed
3 earlier, is widely regarded as a pejorative term. So I think
4 that it's well documented that many school systems find that
5 they can fulfill the requirements of the federal law and
6 provide an individualized education but use the term "learning
7 disability," which is a far less pejorative term than mental
8 retardation.

9 Now, this is not something that I made up. There's
10 substantial research to this effect. And to the extent that
11 that may have influenced the placement for Mr. Wilson, it's
12 important to be aware of.

13 Q Okay.

14 Was there achievement testing records in this case
15 in terms of his academic achievement?

16 A Yes.

17 Q And what picture came out of that for you?

18 A That Mr. Wilson was impaired in all areas of his academic
19 functioning. Now, in some areas more than others. Clearly,
20 his reading has been focused upon a great deal. But if you go
21 through his educational records, whether it's report cards or
22 achievement testing, you are hard pressed to find an area in
23 which he's not impaired to some degree. So this is a more
24 characteristic picture of a person with a mild intellectual
25 disability. And that's why I think it's important to focus on

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1 it.

2 Q And in terms of the numbers of areas he's impaired in,
3 how does his profile differ from someone with, say, a learning
4 disability?

5 A I have several thoughts on that. One comes back to what
6 we were discussing about the purpose of doing an evaluation.
7 What's noted in the AAIDD manual and in all textbooks is the
8 first thing is to identify what the question is. So for me
9 the question was: Does Mr. Wilson have a significant
10 impairment in adaptive functioning? That means I did not do
11 evaluations nor focus on the various other problems or
12 categories of problems that he might experience.

13 I do not consider myself an expert on learning
14 disabilities. In the last 50 years, the classification
15 criteria for mental retardation, this three-part definition
16 that we're familiar with, has changed very little. Fifty
17 years ago, there was no concept of learning disabled or maybe
18 it was called minimal brain dysfunction or one of the various
19 other labels. And over the years, there have been many
20 changes in how experts view a learning disability.

21 I believe Dr. Mapou's report made reference to the
22 standards in the DSM and how he was using different standards.
23 Well, the standards changed. To me, it's a slippery concept,
24 and I don't purport to be the person to say this is a learning
25 disability. My task was to identify deficits in adaptive

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1 functioning.

2 Q And your opinion, just looking at the achievement testing
3 and the other school records, was impairments across the
4 board?

5 A Yes, sir.

6 Q Okay.

7 He also had IEP records --

8 A Yes.

9 Q -- in his files?

10 A Yes.

11 Q And are those records typically ones where goals are set?

12 A Yes.

13 Q And how do you read those records in terms of whether
14 Mr. Wilson was surpassing -- meeting or surpassing the goals
15 set for him, even within special education?

16 A Again, I think that they are useful. Some of the IEP
17 goals are not written very properly. In other words, they're
18 too general. They say things like will improve in this or
19 will improve in that. The better goal is a more specific one
20 identifying the area that is targeted and then, within that
21 area, specific measurable objectives.

22 So to answer your question, those goals and
23 objectives in Mr. Wilson's IEP indicated to me that he was
24 substantially below the expected performance for a person of
25 his age and that, as mentioned earlier, the gap between his

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1 performance and that of others of his age simply widened over
2 time.

3 Q All right.

4 Now, moving on to the next slide in your hierarchy
5 of records, you say work records or Social Security records
6 are important to you, correct?

7 A Yes. I mentioned earlier that I think it's valuable to
8 look at work because it reveals a lot about the individual's
9 capabilities. In the case of Mr. Wilson, his work records, I
10 don't believe there are any formal work records. I believe
11 the temp agency that he worked for briefly is out of business,
12 or at least that was my understanding, that no records could
13 be found. His Social Security records indicate a total
14 earnings of \$38 and some change. So it's really very --

15 Q That's for his entire life?

16 A Yes. So his work -- aside from work that was sort of
17 planned for him as part of an education program, he did not
18 have, as I mentioned earlier, all of the skills that lead up
19 to working, the work search skills, finding a job. Gosh, he
20 had several people diligently helping him. I mean, he went to
21 live with his cousin Vanessa when he was 16 or 17 years old.
22 She took him to look for jobs and fill out job applications.
23 Her, and I think then fiance did the same. His mother,
24 Cheryl, did the same. His girlfriend Monica did the same. I
25 think that there were others. His sister Depetra did the

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1 same. Each time helping him fill out job applications, and
2 each time he struggled to understand the things that were
3 written and to understand his responsibilities in getting a
4 job. The job history that he does have was manual labor of
5 cleaning up one of the areas that was destroyed in the 9/11
6 disaster. I believe that he worked there for three days. And
7 the way that he portrayed it and the way that Ms. Cook
8 portrayed it was that the temp agency didn't call him back
9 after the third day.

10 He reported having another job, I believe from the
11 same temp agency, although it doesn't show in his Social
12 Security records, in which he worked loading and unloading a
13 truck on a loading dock for one day and was not called back to
14 do that anymore.

15 So that's an extraordinarily thin formal work
16 experience.

17 Q I think the question was asked yesterday, well, since he
18 hasn't worked how do we know he has a deficit in work skills?

19 A A deficit is behavior. It's not potential. It's what he
20 has done, and he has not -- he's resisted seeking a job, as
21 reported by his relatives who helped him because he found it
22 embarrassing. The whole process of trying to get a GED and
23 leading to a job, this had been quite a record of this being
24 difficult for him.

25 Q Is part of job skills getting paid, knowing how to cash a

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1 check, put the money in the bank, things of that sort?

2 A Yes. Certainly related skills, yes.

3 Q Did you have some information about that in Mr. Wilson's
4 case?

5 A Yes. It was differing from what Mr. Wilson told me and
6 Ms. Cook told me. But I think Ms. Cook is a good reporter.
7 Mr. Wilson stated to me that he was upset because his check
8 was only for \$19 after doing all this work and there was stuff
9 taken out of it that he didn't understand. And then Monica
10 took him to a check cashing place, and they wanted to charge
11 him something like a \$15 fee to cash the \$19 check. So he
12 refused, and they went home and hung it up on the wall as a
13 reminder of his first check.

14 When I asked Ms. Cook about the same experience, she
15 gave an entirely different story, in which he earned well over
16 \$100, that the check-cashing place only charged 2 or \$3 to
17 cash the check. They did cash the check. They didn't hang it
18 on the wall. He had to be shown how to endorse the check
19 because he didn't know how to do that.

20 So, you know, in answer to your question, there were
21 a lot of things associated with work that Mr. Wilson
22 demonstrated that he did not have that skill.

23 Q All right. Now, the third thing you've got listed here
24 are records in the way of earlier adaptive behavior
25 assessments. Did you have those records in this case?

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1 A Well, what's striking in this case is that I don't
2 believe there was -- at least in the records that I have had
3 available to me, I don't believe that there has been a
4 thorough assessment of adaptive behavior carried out
5 previously. There are some checklists and self-report and so
6 on in some of the programs that he attended. That certainly
7 would not qualify as a thorough or systematic or norm-based
8 adaptive behavior assessment. So part of the importance of
9 doing one in this case is that that information had never been
10 systematically gathered in the past.

11 Q Is that part of the standard of your practice in Atkins
12 cases to do both the intellectual functioning and the adaptive
13 behavior assessments?

14 A Yes. It's part of the definition of intellectual
15 disability.

16 Q Were part of the records you reviewed Dr. Drob's records,
17 the psychologist who was retained by the original trial team?

18 A Yes. Although that focus was on intellectual assessment,
19 as I recall.

20 Q Well, that's my question. Was there anything in his
21 records indicating that he did or directed or had someone else
22 do an adaptive behavior assessment?

23 A Not that I recall.

24 Q Okay. The next group of documents -- and this is again
25 you're listing the order in which you think most reliable to

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1 less reliable, correct?

2 A Yes. Subjectively.

3 Q Interviews with family, friends, neighbors, teachers,
4 et cetera. You did that in this case?

5 A Yes. And that is indicated in the AAIDD manual, that
6 that's a supplementary source of information in addition to
7 using the adaptive behavior scale.

8 Q Is there some attention paid to the number of people
9 you're interviewing and whether the information you're
10 receiving from various sources is consistent in terms of its
11 reliability?

12 A Yes. And to the extent that more people are available,
13 it is beneficial to talk to them, which is not to say that the
14 information that they provide is necessarily valid
15 information. But if there are people who know the person well
16 and are reasonably available to talk to, then talking to more
17 people and, as you said, looking for some pattern of
18 consistency is a good practice.

19 Q Below the interview -- interviews of family and other
20 people, you have on the next slide, 33 -- go back one, I'm
21 sorry -- 32, administering the instruments retrospectively.

22 A Yes.

23 Q Okay.

24 And the type of instruments we're talking about are
25 the three listed here?

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1 A Yes. I listed them because they are the most commonly
2 used current instruments. The third one, the scales of
3 independent behavior revised is probably the least frequently
4 used. Its norms are getting a bit out of date. But it is one
5 that I have used in the past. The other two are widely used.
6 The AAIDD standard or manual indicates that an adaptive
7 behavior scale that addresses the three areas of conceptual,
8 social and practical skills should be used. And to my
9 knowledge, the adaptive behavior assessment system is the only
10 one that does that. So that has been -- for that and other
11 reasons, has been my referred instrument.

12 Q When you talk about them doing retrospectively, you used
13 them and Dr. -- is it true that both you and Dr. Denney used
14 them in the sense that it's now 2012, and you're asking
15 someone to think back to when they knew Mr. Wilson back in his
16 developmental period, correct?

17 A Yes.

18 Q And you're picking out a specific -- as I understood your
19 testimony before, you're asking them to remember him at a
20 specific age as opposed to a period?

21 A Yes. And that is because, with all due appropriate
22 cautions to the use of these instruments retrospectively, in
23 order to take advantage of the norms that are associated with
24 the test, one has to identify the age that you're talking
25 about, because that's how the test is normed. So just, for

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1 example, saying that this is how he functioned when he was 10
2 years old enables you to look at the norms for other
3 10-year-olds and to make a decision about how he functions
4 relative to all the 10-year-olds in the United States. So if
5 we were to just talk generally about how did he do when he was
6 growing up, that would be useful, but it would not allow us to
7 use the norms.

8 Q So I guess one question I have is: If you have
9 contemporary -- contemporary school records, say, showing how
10 he did at age six -- right?

11 A Yes.

12 Q -- and those records were made by people at the time
13 they're observing him, what is the usefulness of asking
14 somebody in 2012 to think back on how Mr. Wilson was at age
15 six and remember and tell me on these scales what you remember
16 him at age six to be in terms of what weight you're going to
17 give to the score on the test versus the contemporaneous
18 records?

19 A The adaptive behavior scale, any of these three that are
20 listed here, for example, cover a lot of topics, corresponding
21 to, you know, the standards of our profession. Some of those
22 topics can be verified by other sources. As you mentioned,
23 school records. Many of them cannot. So if we want to get a
24 broad picture of whether there is significant impairment,
25 significant enough to say that the individual has a

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1 significant impairment in adaptive functioning generally, then
2 we want to use an instrument that is broad enough, systematic
3 enough and has norms that would generate a number, with a
4 great deal of caution. Cautions, part of which you implied in
5 talking about asking someone to use their memory in the case
6 of Mr. Wilson for events that occurred more than 10 years ago.
7 So part of the process for assuring that you have as valid
8 information as possible is assuring that you have a respondent
9 who is able to answer these things.

10 I think the next slide refers to that.

11 Q Next slide. So this is a standard you're using to
12 determine whether somebody has enough knowledge to be able to
13 actually give you information on these scales or tests?

14 A Yes. And this, as you can see, comes directly from the
15 AAIDD. In addition, as you mentioned earlier, the manuals for
16 the scales are pretty specific about identifying people who
17 have the experience and the knowledge and the memory to be
18 able to answer these scales accurately.

19 And also in my report, I have a fairly lengthy quote
20 about what those standards are for choosing someone. As we
21 mentioned earlier, of the 13 people I interviewed, I
22 administered the ABAS to four people, and I judged that they
23 would meet those criteria.

24 THE WITNESS: Are we getting a nod from the judge
25 that we should do something?

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1 THE COURT: Well, I'm indicating by sign language
2 that we should take a ten-minute break. Let's take a break.

3 MS. BRADY: Your Honor, Mr. Wilson had only an apple
4 this morning.

5 THE COURT: Yeah, I'm going to get the marshals to
6 permit you to get something for Mr. Wilson to have. Once
7 they've looked at it and it's acceptable, you can hand it to
8 him. Thank you.

9 (Whereupon, a break was taken at 11:21 a.m.)

10 (Time noted: 11:50 a.m.)

11 THE COURT: The witness should retake the stand,
12 please.

13 Are we all set for Mr. Wilson's food?

14 MR. BURT: Yes. Thank you.

15 THE COURT: Please be seated, everyone.

16 A couple of things before we return to the direct
17 examination.

18 First of all, any lay witnesses that anybody has
19 can't be in the courtroom until they're testifying. You
20 understand that?

21 MR. BURT: Yes.

22 THE COURT: Since I don't know who the lay witnesses
23 are, you'll have to keep an eye on things.

24 MR. BURT: Yes.

25 THE COURT: Second, I've been thinking about the way

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1 we're handling direct examination. And the Court's already
2 reviewed all of the expert reports. So I would prefer if the
3 only direct examination you engage in, after this witness, is
4 to -- if you need to examine the witness to supplement what
5 has been placed in the expert report or to clarify something
6 based on the testimony of another witness or to comment on
7 another witness's later comments or conclusions that would
8 inform the Court in connection with the testifying witness's
9 expert report. That way, we won't -- we really don't need to
10 restate everything in the expert reports here in court, and
11 you have an opportunity to update on direct examination. And
12 then we go into cross, and then we go into redirect. And I
13 think that will speed things along. And also, it will just --
14 I think it will flow better. So that's the way I'd like to
15 handle it from this point forward.

16 Do you have any problem with that?

17 MR. BURT: When the Court says from this point
18 forward, you mean excluding this witness?

19 THE COURT: Excluding this witness. I'm not going
20 to have you change your plan in the middle of a witness. I'm
21 just saying for future witnesses. And you have two more
22 experts, right?

23 MR. BURT: Yes.

24 THE COURT: And you have several experts?

25 MR. MCGOVERN: We have three experts, Your Honor,

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1 and whether we call them all, I don't know.

2 THE COURT: Well, that's up to you.

3 MR. McGOVERN: Thank you.

4 THE COURT: But if they've made submissions, which
5 they have, those submissions are being taken and are being
6 considered, and we don't need to hear from them about what
7 they said in their submissions unless there's something more
8 that needs to be added based on circumstances since they wrote
9 their submissions.

10 MR. McGOVERN: Well, the only thing I would ask Your
11 Honor is with respect to some of the experts -- like for
12 instance off the top of my head, Dr. Patterson comes to mind
13 for us. He did an hour-and-a-half interview with the
14 defendant in which he summarized the interview in his report,
15 but it's really his description of that interview as a witness
16 I believe would give the Court a sense of how it was that he
17 was able to, just in his interactions with the defendant, come
18 to an understanding that the defendant was not mentally
19 retarded. That certainly would be supplementing the report.

20 THE COURT: And that would go for the other side as
21 well, that if there's something that isn't delineated in
22 excruciating detail in the report that you think is important
23 for me to know, then you should by all means examine your
24 witness about that particular discrete issue --

25 MR. McGOVERN: Thank you.

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1 THE COURT: -- or subject matter. So I'm not
2 limiting you. I'm not cutting you off, but I think redundancy
3 is not really that helpful.

4 MR. McGOVERN: Agreed.

5 THE COURT: Okay?

6 MR. BURT: Sure.

7 THE COURT: All right. Are we ready?

8 MR. McGOVERN: Yes.

9 THE COURT: We'll go till one, and then we'll take a
10 break.

11 I remind the witness that he is still under oath.

12 BY MR. BURT:

13 Q Dr. Olley, in terms of this issue that we were discussing
14 before we broke, the use of assessing whether you've got
15 knowledgeable informants, was there a difference between you
16 and Dr. Denney on this issue?

17 A Yes.

18 Q And could you characterize it for the Court and then
19 explain it?

20 A Well, I think there are a couple of aspects, and they
21 concern me a lot. And this is an awkward thing to say as
22 Dr. Denney has been in the courtroom throughout, but I have
23 great concerns with what I learned about Dr. Denney's use of
24 adaptive behavior scales.

25 First is with reference to this slide that's still

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1 up here. There are very clear criteria for who would be an
2 appropriate respondent. As I mentioned, I administered the
3 adaptive behavior assessment system to four people, and think
4 I got, you know, some consistency, some differences. But I
5 think they were valuable people. Dr. Denney interviewed about
6 the same number of people and administered the adaptive
7 behavior scale to almost all of them. And I would contend
8 that most of these people were not in a position to provide
9 valid information on an adaptive behavior scale, and that
10 should have been readily apparent to him. And that if he did
11 administer them, that he would have noted in his report that
12 this was a mistake and that this person was not a valid
13 reporter.

14 Second, you asked earlier about my returning to
15 reinterview some of these individuals, and they were -- part
16 of my concern was that there were such discrepancies between
17 the things that appeared on the adaptive behavior scale that I
18 administered and that Dr. Denney had administered. And in
19 talking to these folks, I wanted to get a sense of that. I
20 wanted to be very careful not to bias them in what I was
21 looking for. And so I tried to ask general questions, such as
22 do you recall that you met with Dr. Denney, and they said that
23 they did. And so I just said something general like, well,
24 how did it go with Dr. Denney? And I received an alarming
25 array of statements independently from each of these folks

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1 indicating how uncomfortable they were with Dr. Denney and how
2 he pushed them to give answers that would push the score
3 upward.

4 Now, I say this with great caution. I've never said
5 this before. I've never encountered this before, and I do not
6 like making such a serious accusation to a colleague. But it
7 was very disturbing to me. I took notes. I've shared my
8 notes with Mr. McGovern, so I'm sure he's well aware of what
9 I'm talking about.

10 This was -- this appeared in everyone that I spoke
11 to, I guess, with the exception of Corey Barnes, who neither
12 of us administered an adaptive behavior scale to, and he was
13 clear that he did not have enough exposure to Mr. Wilson to do
14 that. But other people, such as Mr. Wilson's aunt, Pat Hogan,
15 she gave very high scores. She didn't say that she was
16 coerced in any way, but she did say that it was over the
17 phone, which is not a common accepted way to administer it.
18 She said, oh, I just moved, and I was taking a lot of
19 medication, and I think I just answered however was easiest.
20 Those should be red flags to Dr. Denney --

21 MR. MCGOVERN: Your Honor, I'm going to object to
22 this testimony and move to strike some of the answers because
23 some of these folks that Dr. Olley is referencing were only
24 really made available to the government via the phone. So the
25 fact that Dr. Denney was limited in his ability to speak to

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1 these folks was in large part because of the representations
2 from the defense team that these folks were unwilling to
3 travel and that they would only be able to deal with
4 Dr. Denney over the phone. So I understand and I think it's
5 relevant that the doctor here is saying that somehow these
6 interviews were deficient, but it's an unfair characterization
7 of Dr. Denney's conduct to say that somehow he did less than
8 the best efforts here because the defense really kind of stood
9 in the way of us getting to these folks or making them
10 available to us.

11 MR. BURT: Your Honor, I think --

12 THE COURT: I think it's outside the scope of this
13 person's expertise to comment on hearsay. This is not -- I'm
14 not going to take hearsay from the witness. He should talk
15 about -- you can have him talk about his conclusions and his
16 report and his examinations. But, you know, if you want to
17 bring in these folks as witnesses to talk about how they were
18 treated by somebody, to inform the Court about the value of
19 some other witness's report, well, you can do that. Go get a
20 subpoena. I'm striking the last answer.

21 Next.

22 MR. BURT: Okay.

23 BY MR. BURT:

24 Q Dr. Olley, the next slide lists some -- again, some other
25 records that you relied on in this case, correct?

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1 A Yes.

2 Q And records of therapeutic programs, what programs did
3 you have available on that issue in this case?

4 A I mentioned briefly earlier that there is a value to
5 therapeutic programs, such as the time that Mr. Wilson spent
6 at Elmhurst and Brookwood, which are somewhat different
7 programs, but both have a therapeutic aspect to them. They
8 provided an educational program and they identified the areas
9 of deficiency and they identified the areas in which new goals
10 and targeted instructional periods for Mr. Wilson.

11 Q All right.

12 And what did you learn from those records that was
13 important to your evaluation?

14 A Well, there are many individual statements and anecdotes.
15 They identified the problem behavior of Mr. Wilson, which is
16 also documented well in Dr. Denney's report. What they also
17 told me that I think was more informative was not simply that
18 he engaged in behavior that was inappropriate in school or in
19 therapeutic programs, but what is the standard now for
20 assessment and treatment of such problem behavior is what's
21 referred to as a functional behavior analysis, which is to
22 say, what is the function of this behavior. So rather than
23 simply to say, you know, he engaged in this and some
24 implication that he's a bad boy, look at the underlying
25 antecedents that lead to problem behavior. And these are

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1 better dealt in these therapeutic programs, which is much to
2 their credit. But it helps to identify that from the earliest
3 time in school, Mr. Wilson ran into the academic demands of
4 school and the social demands of school, both of which he had
5 a terribly hard time dealing with. And he dealt with them
6 both by what we would consider inappropriate acting out
7 behavior, but he readily got classified as a child with a
8 behavior disorder or severe emotional disturbance and was
9 placed in programs appropriate for such individuals.

10 Underlying that, however, was these significant
11 difficulties in coping with academic demands that were clearly
12 beyond his ability and social demands in which he encountered
13 other students who made fun of him or in some way or other
14 challenged him, and he did not have the social skills to be
15 able to -- you know, to deal with the taunting.

16 And plus, from the reports of, for example,
17 Dr. Giglio, who not only tested him but was his counselor and
18 therapist when he was at Brookwood, he just missed a lot of
19 the social cues. And that's a very important aspect of
20 identifying significant impairment in the adaptive behavior
21 area of social. A lot of social behavior is pretty subtle,
22 understanding was the person joking or not. Was it really an
23 insult, all of this was he dissing me kind of conflict that
24 Dr. Giglio described. So seeing that in a therapeutic program
25 he could do better in these things in the sense that the

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1 therapists helped him to articulate what was the conflict,
2 what was it that you perceived in the social situation that
3 got you into a fight.

4 And he had -- Mr. Wilson had a great deal of
5 difficulty articulating these things. Not only to Dr. Giglio,
6 but other therapists comment on his difficulty putting into
7 words what these things were all about.

8 So the therapeutic programs were providing useful
9 information about how if he were in a living and educational
10 setting that made reasonable academic and social demands on
11 him, that he was around people who were understanding and
12 supportive of him, that he could make progress. But when he
13 returned to a standard public school setting and living in his
14 community, his behavior deteriorated quite a bit.

15 Q And you made reference to Mr. Wilson being teased. Was
16 that documented in the records?

17 A Yes.

18 Q And what was the nature of the teasing? Did it have any
19 significance in terms of intellectual disability?

20 A Yes. The one that was mentioned most frequently by
21 family members was that his older brother, Isaiah, called him
22 a spesh, for special education, and retard and various
23 derogatory terms like that, which led to lots of fights with
24 his brother. And the same flavor of derogatory comments about
25 his problems with his schoolwork, derogatory comments about

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1 his mother being a crack head, which got him into fights, you
2 know, these are, yes, as you indicated, documented.

3 Q And does that information go to the social domain or is
4 it a conceptual issue or is it a practical issue? Or is it
5 all of the above?

6 A Well, I think it's an overlapping conceptual and social,
7 but there are conceptual aspects of social, in the sense that
8 you have to be able to make some inferences, and apparently,
9 Mr. Wilson was quite -- had quite a difficult time in
10 understanding accurately. Even when he was 19 or 20 years old
11 and living with Ms. Cook. She said, you have to explain
12 everything to him so carefully because he takes things the
13 wrong way. You give him a compliment, and he gets upset
14 because he didn't understand that it was a compliment. So I
15 suppose there is a conceptual aspect to this social problem.

16 Q Now, the next thing you have listed in the hierarchy of
17 things to consider are medical records, correct?

18 A Yes.

19 Q What of significance did you have in the way of medical
20 records in this case?

21 A Well, the importance of medical records, I expect that
22 Dr. Shapiro spoke to yesterday. To the extent that medical
23 records indicate some illness or injury that might have
24 implications, I think the thing that's mentioned most
25 frequently in this context is the meningitis that he was

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1 hospitalized for about 20 months of age. Medical records also
2 contain other references to evaluations that were done. Some
3 of them are just -- I thought, a very interesting one in his
4 Brookwood file was his physician said that he had been
5 vomiting for two weeks because he was drinking milk, to which
6 he was allergic. And why didn't he just use common sense and
7 not drink milk? Well, that was in the records of medical -- a
8 physician made that comment, but it spoke to Mr. Wilson's poor
9 judgment about maintaining his own health. So medical
10 records, you know, sometimes are a lot of routine things that
11 don't bear on the issue of intellectual disability, but
12 they're certainly important to look at.

13 Q All right.

14 Earlier criminal justice records you have listed
15 there. Were there records here that you relied on; and if so,
16 what was the significance?

17 A Yes. Well, the significance to me was mostly in his
18 Brookwood records which were Department of Corrections
19 records. That was more informative than, you know, the fact
20 that he had been arrested for various things in his youth.
21 And I think I made reference to some of the information about
22 the Brookwood records and the therapeutic program there.

23 Q Interviews of the defendant?

24 A I think most people would agree that it's important to
25 meet the defendant, get to know him and to interview him. I

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1 mentioned earlier some of the cautions associated interviewing
2 because characteristics of people of low intelligence to be
3 susceptible to leading questions and to answer questions in a
4 way that would want to please the examiner. And there are a
5 lot cautions associated with that. But I think it's useful to
6 get the defendant's perspective on a lot of things, on his
7 history, his family, his school, his relationships with other
8 people. Even his relationships with his attorneys. And
9 what's his perspective on how well he did in school and in
10 other aspects of growing up. Now, they have that information.
11 It has to be taken in judgment of -- in context of other
12 information as to whether it's congruent. But certainly you
13 wouldn't want to make a judgment about impairment in adaptive
14 functioning without at least meeting the client.

15 Q Did you in this case administer an adaptive behavior test
16 to Mr. Wilson?

17 A No, I did not.

18 Q Did Dr. Denney?

19 A Yes, he did.

20 Q And why didn't you administer an adaptive behavior test
21 to Mr. Wilson?

22 A I believe it's incredibly inappropriate to ask the
23 defendant to be able to report, especially using the adaptive
24 behavior scale. I've spoken to Dr. Oakland, who is one of the
25 authors of the adaptive behavior assessment system, who agrees

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1 that it's an inappropriate use of the test. There is no one
2 in prison who is in the norm group for the test. I think it's
3 going to result in exactly what it did for Dr. Denney, which
4 means spuriously high scores that are simply a reflection that
5 the defendant wants to present himself in a positive way.

6 Q Does the manual contain a caution about that?

7 A It does.

8 Q And what does it say?

9 A Well, it essentially says that such things should be -- I
10 don't think it's a strong enough caution. But it says that
11 the use of such instruments should be done with extreme
12 caution.

13 Q You, yourself don't think it should be done at all?

14 A That's my view.

15 Q Okay. However, the last thing you have listed here,
16 tests of the defendant's performance, is that different than
17 using an adaptive behavior assessment?

18 A Yes. Although, it's Number 10 on my list, so it's
19 getting down low in the sense that adaptive behavior is about
20 behavior. That is performance. Now, there are not very many
21 things that you can test performance in in prison. I did some
22 things that I don't place a great deal of weight on. But
23 things such as being able to use a ruler to measure, which
24 Mr. Wilson was not able to do. And that tells me, well, if
25 he's not able to do it now, he probably was not able to do it

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1 early in his life. And using a ruler is a very small issue in
2 the grand scheme of adaptive behavior. But it was, I think,
3 worth trying.

4 He had some ability to use a telephone book, for
5 example. He understood that the telephone book was in
6 alphabetical order, but he didn't use the categories very
7 effectively. He had difficulty finding things on a map, for
8 example. And these are tests of performance, but they're not
9 norm-based tests. And again, they have to be used with a lot
10 of caution. I wouldn't generalize greatly from them.

11 Q Okay.

12 Did you administer any other test to Mr. Wilson when
13 you interviewed him?

14 A I think the one that comes to mind is not a complete
15 test. It's a subtest of the Stanford-Binet intelligence
16 scale, in fact, a much older version of it. The subtest is no
17 longer used. But I find it very useful in getting a feel for
18 the individual's understanding of orally expressed concepts.
19 It's called -- the subtest is called verbal absurdities. I
20 mentioned it in my report, so I will not dwell on it here.
21 But it's basically a series of statements about things that
22 don't make any sense. And then it is to ask the individual,
23 does it make sense? If not, explain why it doesn't make
24 sense. And there were things -- I think the very first thing
25 was -- I'm paraphrasing here -- something to the effect if the

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1 man had the flu twice, the first time it killed him, but the
2 second time he got well quickly. And Mr. Wilson didn't see
3 any problem with that and didn't see anything that needed
4 explaining. It is an age scale, beginning with age eight.
5 And now these are old norms. So again, taken with great
6 caution.

7 But he failed that subtest at the year eight level.
8 So he went on to pass some other things at higher levels. But
9 in general, he had difficulty with orally expressed concepts
10 that are generally mastered by young children. And since
11 conceptual adaptive behavior is one of the areas that we want
12 to look at, I thought it was informative that he was easily
13 confused by statements that most children are able to explain.

14 Q And did you do anything else with him in the way of
15 performance testing?

16 A Not that I can recall. But if we go through my report,
17 I'm sure I'll spot something.

18 Q Okay.

19 The verbal absurdities test is in the tab marked
20 "Olley Raw Data" in the exhibit there.

21 A Would you like me to look at it?

22 Q Yeah. Just to make sure.

23 A This is the --

24 Q The big one, yes. That's Exhibit F. The Bates number, I
25 believe, is GOV 10717.

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1 A I don't see it. Okay. Thank you. Sorry for my delay.

2 Q Is that the test you were referring to?

3 A Yes, sir.

4 Q Okay.

5 Now, one of the things that you don't have listed
6 here is reports of correctional officers, correct?

7 A Yes.

8 Q And can you give us 36.

9 Are those things that you rely on in doing your
10 assessment?

11 A If it's available to talk to correction officers, I would
12 certainly do that. I have inquired about it in this case; and
13 for whatever reason, they were not available. In this case, I
14 did not. Although, now we have moved to another slide that's
15 titled "More Questionable Sources of Adaptive Behavior
16 Information," and that's because these things are things that
17 generally are not listed in the AAIDD manual as valid sources
18 of valid information.

19 I -- for example, in Dr. Denney's report, he did, if
20 I remember correctly, interview a correction officer and
21 asked: Would you be surprised to find that this man had
22 mental retardation? Now, to me that's an inappropriate
23 question, because the correction officer is not in a position
24 to diagnosis mental retardation under any circumstances, but
25 particularly by observing him, the defendant, in the

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1 restricted environment of the prison. This is drawing upon
2 invalid information.

3 Q Okay.

4 Did you consider -- the next slide is 37 -- facts
5 regarding Mr. Wilson's crime or his past criminal behavior?

6 A I did not.

7 Q And explain why.

8 A Because it's clearly stated in the AAIDD standards manual
9 that facts of the crime or past criminal behavior are not
10 valid sources of information. It's further clear from the
11 standard that under social adaptive behavior, following rules
12 or laws is considered appropriate social behavior, and
13 violating laws is considered inappropriate social behavior.
14 So noting that he -- anything more than that he did violate
15 laws would not shed more light on that diagnosis -- not the
16 diagnosis, but the question of significant impairment in
17 social.

18 Q Now, the sources in this case is slide 39. Does this
19 slide list when you interviewed various people in the case?

20 A Yes. This lists the 13 people who I interviewed and the
21 dates.

22 Q And you interviewed Mr. Wilson twice?

23 A Yes.

24 Q Lillian Barnes, you interviewed twice, correct?

25 A Yes, sir.

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1 Q Who is she?

2 A She is Mr. Wilson's cousin on his father's side.

3 Q Monica Cook, you interviewed, looks like three times?

4 A Yes.

5 Q And who is she?

6 A She was Mr. Wilson's girlfriend at the time that the
7 crime was committed, and he lived with her most of the two
8 years leading up to the time of the crime.

9 Q You interviewed Patricia Hogan on April 17th and
10 November 17th?

11 A Yes.

12 Q Who is she?

13 A She is Mr. Wilson's aunt on -- aunt by marriage on his
14 father's side.

15 Q Vanessa Lindley, you interviewed on June 24th and
16 November 14th?

17 A Yes.

18 Q And who is she?

19 A She's Mr. Wilson's cousin.

20 Q The next slide.

21 A Older cousin.

22 Q Summer Wilson, you interviewed on June 23rd, 2012?

23 A Yes.

24 Q Who is she?

25 A She is Mr. Wilson's maternal cousin.

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1 Q Depetra McMaster, you interviewed on June 26th and
2 November 11th?

3 A Yes.

4 Q And could you identify who she is?

5 A She is Mr. Wilson's older sister.

6 Q Cheryl Hadden on June 26 and November 11?

7 A She is Mr. Wilson's mother.

8 Q Now, typically in these cases, is the client's mother a
9 valuable source of information as to the developmental period?

10 A Yes. I mean, that is noted in manuals of use of adaptive
11 behavior scales, that mothers are probably the most frequently
12 interviewed people for adaptive functioning information.

13 Q In this case, was the mother a valuable source of
14 information?

15 A Yes.

16 Q And were there some cautions about her involvement with
17 Mr. Wilson that restricted or didn't restrict the information
18 you had available from her?

19 A Yes. It certainly was a caution, because as well
20 documented, she was quite negligent of her children when they
21 were young. She was engaged in, you know, illegal drug
22 activity. She was an alcoholic. She had a criminal record.
23 She basically was unavailable for her children. And at a
24 later time, she stopped using drugs and alcohol and became
25 more available. So she is a better reporter now. But

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1 certainly in interviewing her to look back on Mr. Wilson's
2 growing up, she was largely absent.

3 Q And when you say "absent," do you mean physically absent?

4 A She was physically absent but when she was around, other
5 relatives reported that she wasn't much help for anything.

6 Q Who was the person who had the most contact with
7 Mr. Wilson during his developmental period in terms of a
8 caregiver?

9 A Between the ages about five and 14, he was with his, as
10 he referred to, Aunt Lou, Lillian Barnes. So she was with him
11 along then.

12 Q Does Ms. Barnes appear in the record as someone who was
13 bringing Mr. Wilson into these various therapeutic settings?

14 A She did, yes.

15 Q And do the records indicate whether or not she was a
16 reliable historian as to his deficits?

17 A She was not by the record and after interviewing her.
18 She was able -- she is a good example of someone who sort of
19 spent much time with Mr. Wilson at critical periods of his
20 development. She was certainly caring for him, but I found
21 her to be a difficult person to interview. She gave useful
22 anecdotes demonstrating her points, that Mr. Wilson was slow
23 to learn many things growing up. I did not administer an
24 adaptive behavior scale to her. And I think even in
25 Dr. Denney's report, he noted that it was hard to keep her on

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1 topic, and I would certainly agree with that. So I did not
2 feel she was a valid person to administer a scale to.

3 Q Why was she hard to keep on topic?

4 A You ask her about one thing, and she answers something
5 else and goes off in another direction, and you have to steer
6 her back to the question that you were originally asking
7 about.

8 Q So you made the clinical judgment that you couldn't
9 administer a valid instrument to her?

10 A I did make that judgment, yes.

11 Q Okay. Robert Earl Barnes, you interviewed on June 28,
12 2012?

13 A Yes.

14 Q Who is he?

15 A He is Mr. Wilson's father.

16 Q Now, typically in these cases, are fathers a good source
17 of adaptive behavior information?

18 A Yes, with all the cautions that we've stated before, that
19 there could be biases or -- if a father is largely absent,
20 then that father would not be a good source of information
21 either.

22 Q How about in this case?

23 A In this case, Mr. Barnes was largely absent. He was at
24 least as absent as Mr. Wilson's mother was. He has a history
25 of mental illness and alcoholism. I did interview him. He

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1 was cooperative and did not have much information and quickly
2 acknowledged that he simply was not around very much to know
3 what was going on when Mr. Wilson was growing up.

4 Q Annie Louise Barnes, did you interview her on June 28th,
5 2012?

6 A Yes.

7 Q Who is she?

8 A She is Robert Barnes' mother and Mr. Wilson's
9 grandmother.

10 Q All right. The next slide. Did you interview Lillian
11 Barnes on June 28th and November 12th of 2012?

12 A Yes.

13 Q And is she the aunt you mentioned earlier who had primary
14 responsibility in Mr. Wilson's earlier years?

15 A Yes, she is.

16 Q Corey Barnes, did you interview him on November 14th,
17 2012?

18 A Yes.

19 Q And who is he?

20 A He is Mr. Wilson's cousin on his father's side.

21 Q Did you administer an instrument to him?

22 A I did not.

23 Q And why not?

24 A Because on interviewing him, he made clear to me and
25 apparently to Dr. Denney as well, that he had only very

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1 limited contact with Mr. Wilson, and it was several years ago,
2 and that they basically enjoyed playing together when they got
3 together on holidays; but beyond that, he did not have enough
4 information to answer, as I mentioned earlier, the well over
5 100 questions on an adaptive behavior scale.

6 Q Did Dr. Denney administer an instrument to him?

7 A He did not.

8 Q Carla Drezner, did you interview her on April 16th, 2012?

9 A Yes.

10 Q And who is she?

11 A She was a -- well, I say a school psychologist. I'm not
12 sure that she was -- I think she eventually became certified
13 as a school psychologist. She didn't actually have a degree
14 in psychology. She was a teacher who had taken some courses
15 in order to be able to fulfill the role of a school
16 psychologist. She administered one of the intelligence tests
17 and made other comments on a report about Mr. Wilson's
18 development.

19 Q Did you question her at all about how she administered
20 the intelligence test?

21 A Yes, I did.

22 Q And what information, if any, did you learn?

23 A She administered quite a few instruments which turned out
24 to be, I would refer to, as boilerplate or a standard battery
25 that every everybody gets it. So that's off of appropriate

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1 standards in the sense, as I mentioned earlier, first you have
2 to determine what the question is and then choose the
3 instruments to fit the question. And so I think it was common
4 among school psychologists that everybody got the same battery
5 of tests. So she certainly was not the only one to do that.

6 She made comments about that he needed
7 encouragement. And I asked further about what you mean by
8 that, and she gave some examples that when he had difficulty
9 with an item, that she would encourage him to try or praise
10 him when he tried. And, I mean, this is marginal, I suppose,
11 but it's not exactly the way the tests are supposed to be
12 administered. They adhere to a rather rigid standard about
13 what you can say by way of encouragement.

14 And then in her report, she said something to the
15 effect -- this comes back to our point earlier about
16 potential. And I don't know. I think it was sort of
17 generals. I don't know if it was academic potential or
18 intellectual potential. But I asked about that, and she said,
19 well, that's something that we wrote in all the reports from
20 children coming from this background. And that comes back to
21 your earlier question about is it appropriate to give a
22 special, I don't know, extra points or boost or something to
23 people because of their ethnic or socioeconomic background,
24 and apparently she felt that was a standard thing to do. And
25 I don't think that that would be considered an acceptable

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1 practice today.

2 If I could quickly mention, one other thing is that
3 she substituted one of the performance items from the
4 intelligence test, and I asked her why. Because the customary
5 thing is if you -- if the test is spoiled, which is to say it
6 was administered wrong or something was done that you say that
7 one is not going to work, then there's a substitute one. But
8 she said no, she substituted another test because it went
9 quicker and the children enjoyed it more, which is -- you
10 know, I can understand school psychologists are under time
11 pressure, but that would not be an appropriate reason.

12 So that was about all that I delved into looking at
13 how adaptive -- how intelligence tests were administered. But
14 she happened to be available, and she was a nice lady who
15 willingly answered my questions, so I spoke with her.

16 Q I assume in your work, you have reviewed lots of school
17 psychology reports. Would that be true?

18 A Yes.

19 Q Is it uncommon in the school psychology context for a
20 school psychologist to comment favorably on someone's
21 potential, to say that this person has potential in the
22 future?

23 A I don't think it's uncommon. I don't think that -- going
24 back to the AAIDD standards that we mentioned, I don't think
25 that it's appropriate because it's not based on any

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1 verifiable, valid evidence-based standard. It's being nice to
2 the child, but I don't think that it any validity.

3 Q Now, the people that you administered an instrument to,
4 the ABAS-II are listed on this slide, correct? Monica Cook,
5 Vanessa Lindley, Depetra McMaster and Cheryl Hadden?

6 A Yes.

7 Q And did you administer the test properly?

8 A I believe so, yes.

9 Q Did you score the test?

10 A Yes, I did.

11 Q And on the next and last slide, is this a summary of your
12 scores?

13 A Yes.

14 Q Can you explain what is on the slides and what your
15 conclusions from the testing as to whether these scores
16 qualified to allow you to render an opinion that Mr. Wilson
17 met the adaptive behavior deficit prong of the Atkins test?

18 A Yes. And clarifying that, of course, this is only one
19 source, which is the standard scores, and that we gathered --
20 I gathered information from many other sources. But I was
21 trying to pull this together in some way that would be
22 reasonable to explain. In the earlier slides, we talked about
23 that there are three different ways to qualify these scores.
24 So the first column is the four individuals whom you mentioned
25 who responded.

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1 The next column is the DSM-IV and the AAMR 1992
2 standard, which is the standard of two out of 10 areas of
3 significant impairment. So if we include work, which was not
4 actually filled out in my or Dr. Denney's use of these scales
5 because there was not sufficient work history to comment on,
6 assuming, because of that, that there would be a significant
7 impairment in work, then we're looking for two out of 10; and
8 so, going down that column, each of those reporters indicated
9 a significant impairment in at least two out of 10 of those
10 areas. So using that standard, the two out of 10 DSM
11 standard, these reporters showed a significant impairment.

12 The next column is the AAIDD one-out-of-three
13 standard that we talked about, one out of conceptual, social
14 or practical, on us getting a score below 75, taking into
15 consideration the standard area of measurement. And then that
16 column indicates that each of the reporters indicated a
17 significant impairment in at least one out of those three
18 areas.

19 The third column is the AAIDD's criterion of a
20 composite score with a significantly impaired score, in this
21 case, below 75, taking into consideration the standard error
22 of measurement. And again, all four of the reporters gave a
23 composite score that met that standard.

24 So, regardless of which of the three standards we go
25 by, that criterion, those criteria are met for significant

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1 impairment in adaptive functioning using just the scores on
2 the adaptive behavior scale.

3 Q And did you confine the basis of your opinion just to
4 these stores?

5 A No, I did not.

6 Q What else did you fact or into your opinion?

7 A Information from records and information from the
8 interviews that I conducted.

9 Q Okay.

10 And in your report, did you actually go through each
11 of the 10 areas in the DSM and the three areas in the AAIDD
12 manual and summarize the factual basis for your opinion as to
13 each area?

14 A Yes, I did.

15 Q Could you just briefly walk through those areas and tell
16 us why you concluded that Mr. Wilson met the criteria within
17 each area or the ones that you concluded that he did meet?

18 A Yes. I will try to be respectful of the judge's request
19 not to just read the report back. If there's some concise way
20 that we can address it, I would be glad to.

21 Q Sure. I guess the best way to address it would be to
22 turn to Page 14 of your report, where you begin to list the 10
23 areas, the DSM areas, correct?

24 A Yes.

25 Q And this report was written at a point in time when you

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1 had not seen Dr. Denney's report, correct?

2 A Yes.

3 Q And as I understand it, you continued to conduct
4 interviews in the case after this report was written?

5 A Yes.

6 Q Okay.

7 So it might be helpful to go through the domains
8 here and indicate what information, especially the information
9 that you learned that is not reflected in the report, that you
10 are using as a basis for your opinions. And also with
11 reference to Dr. Denney's report, how that factored in or
12 didn't factor into your opinion on each of these domains.

13 So first of all with respect to communication, why
14 did you conclude that he had a deficit in communication?

15 A I interviewed several family members and received quite
16 congruent information about difficulties in communication from
17 an early age up through the time of the crime. They were slow
18 in talking and putting words together, but more importantly,
19 difficulty in communication. It was frequently reported you
20 had to say things to him several times to get him to
21 understand or you had to simplify your language or that his
22 younger sister, Sharise, would pick up on things more readily
23 than he would or that Sharise would have to explain things to
24 him even though she was a year younger. And similar examples
25 continuing up to examples given with Ms. Cook and some of

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1 which I made reference to earlier, that when they were living
2 together, that you had to tell him things repeatedly. You had
3 to give him instructions one at a time because he couldn't
4 remember several of them.

5 So these were examples that cut across his receptive
6 language, which is to say he didn't understand accurately
7 things he was told, and his expressive language, where he
8 spoke seldom in sentences but in sentence fragments and
9 phrases and brief explanations for things. I found this to be
10 a consistent pattern among all of the informants I spoke to.

11 Q Is there a sort of a mental equivalency benchmark that
12 you look to or sort of use in determining, you know, what
13 level of language or communication achievement someone reaches
14 when they have an intellectual disability but they're at the
15 higher end of the range?

16 A Yes, although I have to say that it's not politically
17 correct these days to use mental age in the way that it was
18 done many years ago. And the caution for that is, of course,
19 it's an oversimplification. If someone is 30 years old and if
20 you say he has a mental age of nine or 10 or whatever, that
21 doesn't mean he's exactly like a 10-year-old. But there are
22 some comparisons that are worthwhile, and the general cutoff
23 in mental age that has been recognized for many years for an
24 intellectual disability is about 11 or 12 years of age. So I
25 think it is useful when looking at communication or any of

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1 these other adaptive behavior areas to think as a kind of
2 metric, how well does an 11- or 12-year-old communicate. And
3 of course, we know that they can communicate in a quite
4 sophisticated way.

5 Q Okay.

6 And can one with an intellectual disability improve
7 their communication skills, depending upon the kind of support
8 or information that they are getting from their environment?

9 A Yes. Especially someone who, you know, has a mild
10 impairment.

11 Q Now, you conclude that Mr. Wilson had a deficit in the
12 communication area?

13 A I did.

14 Q If, as I'm sure will happen on cross-examination, you're
15 confronted with recorded telephone calls by Mr. Wilson in a
16 custodial setting, which shows his language, the back and
17 forth between him and a girlfriend, for instance, is that
18 going to be information that's going to be useful to you in
19 determining whether or not your opinion is correct or not?

20 A I don't believe so because that is information gathered
21 in, as you mentioned, a custodial setting, which is not
22 acceptable using the AAIDD standard.

23 Q Is it necessarily a contradiction if his language skills
24 sound improved in 2012 in terms of whether he had a deficit
25 back in -- back at the time of the crime in this case, in

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1 2003?

2 A It's certainly possible that one's communication skills
3 could improve. It's also difficult to determine if a
4 particular E-mail or a particular telephone call represented
5 typical community behavior. So, if you choose something that
6 sounds rather sophisticated, is it typical and is it relevant
7 because it happens so long after the time of the crime?

8 Q Okay.

9 And can you give us an example from the records or
10 from your interviews of what you mean by a communication
11 deficit? Why do you say that he had that deficit in his
12 developmental years?

13 A Based upon the interviews that I just discussed, I found
14 many examples of his having difficulty in both receptive and
15 expressive language. And even I mentioned earlier and you
16 pointed out in the records, the administration of the verbal
17 absurdities subtest. That was a difficulty he had in
18 receptive language. He did not understand and could not
19 explain language using concepts that would be readily
20 understood by a younger child.

21 Q Did you attempt to get him to communicate with you when
22 you met with Mr. Wilson, either in writing or the back and
23 forth between the two of you? And if you did, what were your
24 conclusions?

25 A Well, certainly in conversation, I did. And I spoke with

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1 him twice. And as I noted in my report, the second time, he
2 seemed to be having a hard time about something. He was less
3 forthcoming. It required more urging to get him to engage
4 with me, to answer my questions, which he eventually did.
5 But, you know, the expression "like pulling teeth." It was a
6 little bit at a time, and you had to ask over and over again
7 to get information.

8 And the first time that I met with him -- and this
9 might fall more in the area of functional communication. But
10 as we know, there's a lot of overlap between these categories.
11 I asked him to write a letter. And as I noted in my report,
12 he was very reluctant to do that and gave many reasons why he
13 can't just sit down and write a letter; but then with some
14 urging, was asked if he would just write about what did we do
15 today, and he wrote instead about what he did before coming to
16 our interview. And it was very brief, and it was -- it was
17 spelled correctly. It didn't have much punctuation. But it
18 was a brief and intact letter.

19 Q And --

20 A It wasn't a letter really, it was just a description.

21 Q Did that letter and your other communications with him in
22 2012 indicate that he did not have a communication deficit or
23 that he did?

24 A I don't think that my conversation with him would qualify
25 as a thorough evaluation of his current communication skills

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1 because we know that people with mild intellectual
2 disabilities can carry on rather superficial conversations
3 with relative ease. The reason that -- I don't mean to put
4 too much emphasis on it, but the reason for giving those
5 verbal absurdities was because it requires him to do some
6 analysis of concepts rather than just repeating information.

7 Most of my interview, and I think other people's
8 interviews, is often tell me factual things. Tell me your
9 name. Where were you born? Who is in your family? Where did
10 you go to school? Things that you were interested in doing
11 growing up. This is repeating factual information, which a
12 person with mild intellectual disability should be able to do
13 just fine. So before you could really do a good assessment of
14 current communication skills, you'd have to do a lot more
15 testing, you know, along the lines of the verbal absurdities
16 to get at something more than casual conversation.

17 Q And of course, what you're trying to look at is
18 communication deficits in the developmental period?

19 A Yes. And near the time of the crime.

20 Q And you're interviewing him in 2012 in a very special
21 context, right? He knows when you're interviewing him that
22 you're there to assess whether he is intellectual disabled for
23 the purpose of ruling him in or out of the Atkins test?

24 A I believe so. I believe his attorneys have discussed
25 that with him.

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1 Q Is it possible that he could be minimizing his language
2 skills when he talks with you or someone else in order to fake
3 back, to try to make it seem like he doesn't have the deficit
4 when in fact -- try to make it seem like he has a deficit
5 when. In fact, he doesn't?

6 A Is it possible? Yes, it's possible.

7 Q Is that one of the reasons why you looked to whether he
8 had a deficit during the developmental period that is
9 documented by the record?

10 A Yes.

11 Q Are there examples in the developmental period where he
12 is in situations where he is trying to communicate or a
13 teacher or someone who's writing the record says it's notable
14 that he is mute or he is not communicating?

15 A Yes. There were circumstances in school and in testing
16 and in therapy situations in which he refused to speak. He
17 did not speak. "Refused" reads into it more than I should.

18 Q When you say in the testing situation, do you recall, for
19 instance, reading an evaluation by Mitchell Frank, where he
20 was assessing Mr. Wilson's verbal abilities and his
21 communication deficits?

22 A Yes.

23 Q Was that significant information to you in assessing
24 whether he had a deficit in the communication area?

25 A That would be one piece of information to take into

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1 consideration.

2 Q Okay.

3 In the school context, you said there were other
4 documentation of his inability to communicate?

5 A Well, he didn't -- he dealt with his academic and social
6 difficulties with what I would consider and apparently
7 teachers considered poor coping. So he acted out in a variety
8 of ways that are mentioned, and some of that was simply
9 refusing to cooperate with whatever the activity was.

10 Q Okay.

11 Now, on Page 16 of your report, you address the
12 secondary, which is self-care. What was your --

13 THE COURT: Can I ask a question about
14 communication?

15 MR. BURT: Sure.

16 THE COURT: Did you provide the witness with a copy
17 of the KEL recordings on the night of the murders to review in
18 terms of his ability to communicate at the time of the
19 murders?

20 MR. BURT: I didn't get the first part of the
21 Court's question.

22 THE COURT: Did you provide the witness with copies
23 of the recordings, the KEL recordings on the night of the
24 murder in connection with the question of the defendant's
25 ability to communicate at the time of the murders?

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1 MR. BURT: I understand. No, we did not, Your
2 Honor.

3 THE COURT: And why not?

4 MR. BURT: Frankly, I'm not sure I had those
5 available to me.

6 THE COURT: Well, they were available at the last
7 trial. And if this witness is going to comment on
8 communication skills, it would seem that there are -- there is
9 documentary evidence of his ability or inability to
10 communicate at the time of the murders, which I would imagine
11 might be of interest to an expert witness who's commenting on
12 the ability of the defendant to communicate in a rational and
13 sophisticated way.

14 MR. BURT: I think it's a good point, Your Honor,
15 and I don't think any expert on either side has been provided
16 or commented upon that material.

17 THE COURT: Well, you know, I'd say that that's a
18 real deficit in the evidence or the analysis here.

19 Go ahead.

20 BY MR. BURT:

21 Q Okay. Now, on Page 16 of your report is the area of
22 self-care, correct?

23 A Yes.

24 Q What was your conclusion with respect to that area?

25 A My conclusion, I used the expression or the term "mixed,"

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1 which is to say that there certainly -- Mr. Wilson was slow to
2 acquire self-care skills. I'm reluctant to say that there
3 would be a significant impairment, because self-care is such
4 an easy standard to meet. Most seven- or eight-year-olds
5 surely would be able to do the things that are required here.
6 It's basic hygiene and so on.

7 The reason it's mentioned is that Mr. Wilson had a
8 certain odd history of these things. When he was living with
9 Aunt Lou, she taught him these things, and she emphasized that
10 she did, and it took a lot of repetition for him to learn
11 self-care skills. But then when he went to Elmhurst, for
12 example, he seemed to not be good at these things and had to
13 be taught them all over again. And then he left Elmhurst, and
14 he was back in public schools. And then later he was at
15 Brookwood, and then again, they commented that he had such
16 poor self-care skills. And so they had to teach him those
17 things again, and he eventually met criterion for these very
18 basic skills. And he left Brookwood; and at a later time, he
19 was at in prison at Rikers. And then he went to live with
20 Monica Cook. And she commented that when he arrived, he had
21 poor hygiene, and he didn't own a toothbrush and didn't seem
22 to care about how he was dressed. She had to teach him those
23 things all over again. So it's a very puzzling pattern of
24 learning something that is definitely a practical skill. It's
25 not something that requires any kind of sophisticated

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1 understanding. And yet he'd remember it; and then he'd just
2 quit doing it, and he had to be taught again. I think it's
3 odd. I mean, I described it as mixed because eventually he
4 did learn these things, and I think he does not have problems
5 with these things today. But I thought it was a peculiar
6 pattern over his developmental period.

7 Q And just to be clear, when you say it was mixed, do you
8 mean by that that you are not rendering an opinion that he has
9 a significant deficit in that area because the evidence is
10 mixed?

11 A That's correct.

12 Q How about the third area, home living, which is
13 summarized, what that concept means on Page 16 of your report.
14 What was your conclusion with regard to that area of...

15 A My conclusion was significant impairment in home living.

16 Q And why?

17 A Home living, of course, has a certain meaning for adults,
18 to be able to have all of the skills and the judgment to be
19 able to live independently. And the expectations for children
20 are different, depending upon the person's age. But we expect
21 someone to show progress toward those skills. And in fact,
22 there was a specific course at Brookwood on home living, which
23 I'm not sure that Mr. Wilson ever passed. But anyway, he did
24 have training on these things; and yet by the time that he
25 left Brookwood and again he was living with Monica Cook, she

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1 was noting that he had inadequate skills in the common things
2 of maintaining a household, you know, cooking and cleaning and
3 certainly moving in the direction of being able to -- be able
4 to financially manage a household. So these are sort of a
5 combination of the practical skills to know what money is
6 about and spend money and the conceptual skills of being able
7 to plan ahead and have a budget and so on.

8 So I think there are other -- I was just
9 summarizing, but I think there are other examples there of
10 which Mr. Wilson had the opportunity for instruction in home
11 living and yet never demonstrated the age-appropriate skills.

12 Q So your conclusion here is that he did have severe
13 deficits?

14 A Yes.

15 Q The fourth area is social, as defined at Page 17 of your
16 report. What were your conclusions with respect to that area?

17 A My conclusion was that Mr. Wilson had at that time a
18 significant impairment in the area of social.

19 Q And could you explain why?

20 A I mentioned earlier, for example, that the social aspects
21 of school were difficult for Mr. Wilson and that he responded
22 to conflict in not good coping by getting into fights. And
23 there were mixed information about his making friends. But I
24 should point out that the standard for social is more than
25 that were friendly or that you have some friends, but rather

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1 that you develop an age-appropriate ability to recognize
2 social cues and to respond to them appropriately.

3 So I'm repeating some things from earlier that I
4 don't really want to do. But in his IEP at different ages and
5 comments from therapists, it's noted that he has significant
6 difficulties in social interaction. He seemed to get along
7 best with adults who were friendly and not making big demands
8 upon him. But he exhibited remarkably bad social judgment in
9 his choice of friends in that he had opportunities to be
10 friends with other students; and his choice of friends was
11 continually, whenever he had the opportunity, to go to
12 Staplewood and to hang out with kids who were getting in
13 trouble. He was counseled repeatedly about the risks of this.
14 There were comments, several comments in his Brookwood files
15 about the standard that is not included in any of the adaptive
16 behavior scales, which is the naivety or gullibility that is
17 associated with the social area. He is someone, his sister
18 Depetra said you could talk about him into anything. He could
19 be easily persuaded, and he had a poor social judgment to
20 choose friends who engaged in criminal behavior. So I think
21 that one factor alone is pretty persuasive about his poor
22 social judgment.

23 Q So at this point, you've already identified three areas
24 where you believe he's deficient, significantly limited?

25 A Yes.

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1 Q So even if the Court's point about the conversation at
2 the time of the crime, even if that led you to believe he had
3 excellent communication skills, would he still qualify under
4 the standards for significant limitations, just based on the
5 two you've discussed other than communication?

6 A Yes.

7 Q Okay.

8 And you found other deficits besides the three that
9 we've discussed, correct?

10 A Yes.

11 Q For instance, Number 5, community use?

12 A Yes. Actually, community use was one of the ones in
13 which I had concluded that there was mixed information.
14 Community use is a mix of being able to find your way around
15 your community and being able to take advantage of the
16 community activities and functions. Mr. Wilson had to be
17 repeatedly shown how to get to places. Ms. Cook gave examples
18 of how her young children assisted him in finding his way to
19 get from place to place. He did not drive until he was much
20 older, and then he -- Depetra commented, if you see Ronell
21 somewhere, there's always somebody with him. So he needed
22 somebody to get him from place to place. Yet with repetition,
23 he did learn how to use the subway and how to get from one
24 borough to the other. He did not engage in sophisticated use
25 of his community. He went to the boys club, I think, once,

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1 Shanell mentioned, and then he felt socially awkward about
2 being there with a bunch of people he didn't know, and he
3 didn't go back. So I would say that's a picture that's mixed.
4 It's not that he couldn't find his way around. It just took
5 him a long time to learn how to do it.

6 MR. BURT: Your Honor, would this be a good place?

7 THE COURT: Yes, this would be a good place to break
8 for lunch.

9 I'm really troubled by that conclusion based on the
10 evidence that was adduced at the murder trial. And I really
11 think that before we get a definitive statement from this
12 witness about his ability to find his way around, that means
13 the defendant's ability to find his way around, this witness,
14 despite your valiant effort to validate what he said without
15 listening to the tape recordings -- this witness should hear
16 the tape recordings. Because in the tape recordings, he had
17 absolutely no difficulty finding his way around and ordering
18 people around as to where they should go and how to get there
19 at the time of the murders. And so for this witness to sit
20 here in my courtroom and say that he had mixed abilities to
21 find his way around is an absurdity. Do you understand that,
22 Mr. Burt? It's an absurdity. And I'm not going to sanction
23 it. If he wants to reach that conclusion, he first needs to
24 hear the tapes.

25 MR. BURT: Your Honor, I believe --

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1 THE COURT: Let me finish.

2 MR. BURT: I apologize.

3 THE COURT: You've had a lot of time to put this
4 together. I've given you a lot of latitude. It's cost a lot
5 of money with experts. But when I raise an issue, for you to
6 sort of brush it off with a simple question, well, even if, I
7 think that that's unfair to the interest of justice, frankly.

8 MR. BURT: Yes, Your Honor.

9 THE COURT: Unfair to the interest of justice. And
10 then when we have this discussion about the ability to find
11 your way around. Have you listened to those tapes, Mr. Burt?

12 MR. BURT: The tapes the --

13 THE COURT: The KEL tapes on the night of murders.

14 MR. BURT: As I said to the Court --

15 THE COURT: You ought to listen to the KEL tapes and
16 then have this witness listen to the KEL tapes. And if he'd
17 like to make, and I would any that he make, an additional
18 submission as to whether that in any way affects his
19 conclusions. And if not, that's fine. If so, that's fine.
20 But I don't think that the record is complete without
21 consideration of the documentary evidence on the night of the
22 murders.

23 MR. BURT: I understand. Your Honor, could I
24 clarify one point?

25 THE COURT: No. Not until after lunch. I have to

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1 do a sentencing. We'll see you after lunch, sir. We'll take
2 an hour for lunch. Thank you.

3 (Whereupon, a break was taken.)

4 (Continued on the next page.)

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1 AFTERNOON SESSION

2 (Honorable Nicholas G. Garaufis takes the bench.)

3 THE COURT: All right. Be seated, please. We'll
4 get the witness in a moment. That's fine. A couple of
5 things; Mr. Burt, you went through a list of people that the
6 witness spoke to and their relationships with the defendant.
7 Where is the defendant? We'll wait.

8 (Defendant is in the courtroom.)

9 THE COURT: All right. Mr. Burt -- the defendant is
10 present. You went through a list of group of individuals that
11 the witness interviewed and the relationship with the
12 defendant, whether it was a family relationship or another
13 friendship relationship. Would you give me a list of all
14 those people, just a separate list. I know it's all covered
15 in the report, but just list the names and the identifying
16 relationships.

17 MR. BURT: Oh, certainly. Sure.

18 THE COURT: If you can put it up on ECF, I would
19 appreciate that.

20 The other thing is the point I was making earlier is
21 when you are speaking about certain skills that the defendant
22 may or may not have the ability to find his way around, the
23 ability to communicate with others and leadership skills, for
24 instance, what happened on the night of the murders may be
25 instructive, but may not be. But at least if I have a

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1 question of the witness, of an expert, about the expert's
2 conclusions, I might ask: Does this inform your judgement in
3 any way? If it does, tell me how. If it doesn't, tell me
4 why. And that's really what the point the Court was making.

5 MR. BURT: Sure.

6 THE COURT: And then you said you wanted to make a
7 point, so why don't you make your point.

8 MR. BURT: Well, the point I was going to make,
9 first of all, the Court's point is a good one. And over the
10 lunch hour we did have someone go to Mr. Stern's office and
11 retrieve the tape. Dr. Olley started to listen to it, but we
12 ran out of time. We certainly will have him review the entire
13 tape as soon as we get a chance to do that, so he's in a
14 position to answer whatever questions may come up either from
15 the Court or from the government.

16 And I apologize to the Court, it was a defect on my
17 part in not recognizing the importance of that tape. I wish I
18 had done so.

19 THE COURT: Well, I was at the trial, so it had
20 obviously -- I was aware of it. And when the witness started
21 talking about the ability to find his way around, the
22 defendant's ability to find his way around, his ability to
23 communicate and so forth, that struck a note with me.

24 MR. BURT: Sure.

25 THE COURT: Based upon what the evidence at the

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1 trial and whether or not it would inform his conclusions
2 regarding the defendant's adaptive status in all the
3 categories, I don't know, but I'd like to hear about it from
4 the witness. And it doesn't have to be -- it doesn't have to
5 be in court, it can be in writing and subject to questioning
6 by the other side, okay?

7 MR. BURT: Thank you.

8 THE COURT: Anything from you, Mr. McGovern?

9 MR. MCGOVERN: No, your Honor.

10 THE COURT: And that goes for all the witnesses.
11 I'm not talking about just this witness. Anyone that is going
12 to talk about these issues should at least have had the
13 opportunity to have heard the documentary evidence that might
14 effect their views on the defendant's adaptive skills.

15 MR. BURT: Sure. And it's not a problem with the
16 other witnesses, we'll make sure they view that material
17 before they testify.

18 THE COURT: All right. Good. Let's bring the
19 witness back.

20 (Witness retakes the witness stand.)

21 THE COURT: Okay. I remind the witness he is still
22 under oath. You may inquire.

23 CONTINUED DIRECT EXAMINATION

24 BY MR. BURT:

25 Q Okay. Dr. Olley, the point I wanted to clarify with you

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1 as a witness, this area of community use, I think you said the
2 evidence there was mixed in the sense that there are some
3 indications that he didn't have that skill, others that he
4 gained it. And was your conclusion from the fact that it was
5 mixed that you could not, with confidence, conclude that he
6 had a deficit in community use?

7 A That's true. I concluded that he did not have a
8 significant deficit in community use. He certainly knew his
9 way around his immediate neighborhood, as defined as the
10 Stapleton area. It took him a long time to learn his way from
11 longer, other distances, but by the time of the crime he had
12 achieved that.

13 Q And the point is you are going through each of these
14 domains and looking and trying to weigh the evidence and
15 trying to make a clinical judgement in terms of whether you
16 feel confident to say he had a significant limitation?

17 A Yes, sir.

18 Q And in your report when you say the evidence is mixed you
19 are concluding that there is just not enough there for me to
20 say with confidence he is deficient in this particular area?

21 A Yes, not enough to say that it's a significant
22 impairment.

23 Q Okay. But the communication one, the first one we talked
24 about, you do think there is significant impairment, correct?

25 A Yes.

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1 Q And you had begun to listen to this tape that the Judge
2 referred to?

3 A Yes.

4 Q And you'll be prepared either by tomorrow morning, if
5 you're still here, or to submit a written supplement
6 addressing that issue?

7 A Yes.

8 THE COURT: Thank you.

9 Q So let's move on then to the next category, which I think
10 is at page 20 of your report, and it's in the manuals it's
11 called self-direction, but what is the gist of that adaptive
12 behavior skill? What is it that you are looking for?

13 A Could you remind me of the page number?

14 Q Page 20.

15 A Okay. Self-direction, and it's explained more fully in
16 the AAIDD user's guide, is, in many ways, just what it says.
17 Relative to other people his age, does the individual make
18 appropriate decisions about his own life. By the time we
19 would consider Mr. Wilson, at the time of the crime, because
20 he was 21 or almost 21, the standard would be that he would be
21 making some decisions about what he wants his life to be like,
22 what kind of place he wants to live, who are the important
23 people in his life, does he have long-range goals, those sorts
24 of things.

25 So looking at that, you know, at that age of 20 and

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1 immediately before asking people in his family and people who
2 knew him, did he have self-direction, did he make decisions,
3 reasonable decisions about his own behavior, take
4 responsibility for himself and his own behavior, and the
5 answers were uniformly that he did not. Comments such as he
6 -- I forget, I'll try not to quote if I cannot exactly
7 remember, but the comments from family members were no,
8 essentially he lived day-to-day, he was impulsive, he didn't
9 have any sense of money and planning for what is -- how he was
10 going to organize his life.

11 So it might have those related things and scores on
12 the self-direction or the adaptive behavior system. I did
13 include that he had a significant impairment in
14 self-direction.

15 Q And self-direction is not the same skill as the ability
16 to give directions, being able to direct people or give
17 directions; is this a different concept?

18 A Yes, it is a different concept, indeed. It says here,
19 skills related to making choices. So making choices about
20 your life, using good judgement.

21 Q And how does it play into that domain if the choices are
22 bad choices? And by that I mean, somebody could say well, he
23 made a choice to kill somebody or he made a choice to engage
24 in criminal behavior? That would be a choice. Is that what
25 this skill area is talking about or do they have to be good

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1 choices as defined by society?

2 A I think they have to be good choices as defined by
3 society. And this is an area of some research on decision
4 making, problem solving. That is to say, when a person
5 encounters a problem defined as something new, something they
6 don't have a routine answer for, how they go about making a
7 decision about what is the best way to proceed.

8 And there are programs for teaching decision making
9 and problem solving skills, there is a professor here at
10 Columbia who has worked extensively on that area, because it's
11 a common area for people who have low intelligence, that they
12 don't make good decisions, they engage in what Steven
13 Greenspan refers to as foolish actions.

14 And, of course, we all have foolish actions at
15 sometimes, but we try not to make the same mistake too many
16 times. It's more of a difficulty for people with intellectual
17 inability.

18 Q So were you focusing your interviews with family and
19 friends, members on what kinds of foolish actions to summarize
20 it was Mr. Wilson's typical behavior?

21 A Yes. Typically when he had to make a decision, did he --
22 how did he go about it? Was it an impulsive decision, which
23 it often was. And it's documented in his school record that
24 he got into difficulty because he had, for example, in a
25 social realm, he had a disagreement with another student and

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1 instead of some kind of reasonable resolution to the problem,
2 he got into fights. When he was at Brookwood, he got into
3 more fights than the average student, according to Mr. Giglio,
4 and these are indications that he's not making good decisions.

5 Q So your conclusion here is that there was a significant
6 deficit?

7 A Yes, sir.

8 Q How about in the seventh area, health and safety, what is
9 that trying to get at in terms of the domain you are looking
10 at?

11 A Well, again, it's all relative to the expectations to a
12 person's age. Has the person learned the expected behaviors
13 and responsibilities in maintaining health and avoiding
14 dangerous situations?

15 The examples that were given by family members had
16 to do with what Mr. Wilson would do as a child. He would do
17 dangerous things, particularly if someone would dare him to do
18 it, he would climb up into high places that he could easily
19 fall. He was never regarded as safe in the kitchen. Comments
20 were made in his school IEP that he didn't use knives in the
21 kitchen safely, that was about ten years of age, I believe.
22 So I think there are examples like that throughout his
23 history.

24 I gave the example earlier about the physician that
25 said he wasn't using common sense to avoid milk, even though

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1 he knew that milk would make him throw up. Now, when living
2 with someone else, of course parents and caretakers with
3 children make a lot of those kinds of decisions about when to
4 go to the doctor and so on for the individual, so you have you
5 to look at what's relative to what's expected of the person's
6 age.

7 Q So what was your conclusion on that?

8 A My conclusion was that he does have a significant
9 impairment on health and safety.

10 Q And the eighth area of functioning academics; what does
11 that mean?

12 A Most of our information about academics, and there is a
13 great deal of it has to do with either his school performance
14 or his performance on formal academic achievement tests, such
15 as the Woodcock-Johnson or the Wechsler Individual Achievement
16 Test. Although these are certainly relevant and should be
17 taken into consideration, functional academics, the functional
18 part of that expression is what does the person use that
19 information for in everyday life.

20 So you would look at -- well, I'll give the example
21 of in a kitchen that there were comments on Mr. Wilson's IEP
22 that he did not, you know, he couldn't measure, he couldn't
23 apply reading and math to everyday life, whether it's reading
24 a menu or whether it's being able to complete a job
25 application. If you think of all of the areas in which we

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1 apply school skills, in Mr. Wilson's case carried over to
2 everyday life, that is difficulties in academic skills. I
3 gave him a significant impairment in everyday functioning.

4 Q And when you mentioned the test, I think you said the
5 Woodcock-Johnson and the second one was a Wechsler test,
6 that's not an IQ test, that's an academic achievement test?

7 A That's correct. I believe Dr. Denney administered the
8 Woodcock-Johnson achievement test and Dr. James administered
9 the Wechsler Scale, not to be confused with the intelligence
10 scale, the Wechsler Individual Achievement Test, and they
11 yielded roughly comparable results; although, it's hard to say
12 that, because you can't make a direct comparison.

13 Dr. James reported grade equivalence, which is to
14 show that even in this very recent testing, that Mr. Wilson's
15 academic skills are below sixth grade, which is generally what
16 we think of as the upper limits of what a person with mild
17 intellectual disabilities would accomplish. And the grade
18 equivalents were more in the second to sixth grade level with
19 some lower, particularly in reading and language skills. As I
20 recall, the report of the Woodcock-Johnson by Dr. Denney
21 reported standard exposures did not report grade equivalence,
22 so we can't really know what the grade equivalence were;
23 although, I suspect that they were comparable to what
24 Dr. James found.

25 Q And these grade equivalences are in relation to when he

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1 was tested; in other words, when did Dr. James conducted her
2 testing?

3 A Well, recently within the past few months.

4 Q And her testing is designed to show what his grade level
5 was at the time she tested 2012?

6 A Yes. So currently, and I think both of the testing --
7 both the testing by both experts was done in about the same
8 timeframe, and both showed that he was quite -- current,
9 continued to be quite low in academic skills. Although, the
10 argument has been made that since he's been incarcerated, he's
11 had more opportunities for learning, that he has improved
12 somewhat in his academic skills.

13 Q And you're saying that this does not just depend on
14 scores on achievement tests, but looks at how someone in daily
15 living applies academic concepts to real world problems?

16 A Absolutely. That's what is meant by functional
17 academics.

18 Q And here again you conclude?

19 A I concluded that he did in childhood and at the time of
20 the crime have a significant impairment in functional
21 academics.

22 Q The ninth area is leisure. What was your conclusion in
23 regard to that area?

24 A My conclusion was that Mr. Wilson had a significant
25 impairment in this area as well, which is a bit surprising;

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1 again, in that the expectations for this area are not terribly
2 high.

3 Mr. Wilson had some interest in, I guess, a
4 continuing interest in basketball. I think he played some
5 other sports when he was younger, but when you look at the
6 idea, I think if you could have a central point to this area,
7 it is how do you use your free time? Do you use it in some
8 constructive way? That is to say, do you have an interest or
9 a hobby that you pursue or do you stand on the street corner
10 and do nothing or, you know, the equivalent of wasting your
11 time.

12 And many people, for example, Monica Cook reported
13 that Mr. Wilson really liked to play games with her children,
14 who at that time were under 12 years of age, I believe, and he
15 liked to play the games that they liked to play and he enjoyed
16 playing at that level. And I asked her, well, did he like to
17 do that just because that's what you do when you are with
18 children, you know, you play the games that children like to
19 play in order to entertain them. And she said no, I think
20 that was his level and he enjoyed it because he was right at
21 the level of these children.

22 And when I asked him about it, about his leisure
23 interests, he made an interesting distinction. He said that
24 he didn't like to play what he called mind games, he liked to
25 play things that involved manipulation of objects. And that's

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1 a pretty good description because -- and I asked Ms. Cook
2 about this and she said yeah, he didn't like the kind of games
3 that require a lot of thinking and abstract planning and
4 thought he liked things that he could manipulate, and she gave
5 some examples of children's games.

6 I think there was some differences of view about
7 video games. And Ms. Cook -- and again, I refer to her
8 because she's the best source right before the time of the
9 crime, said that he really didn't have interest in video games
10 and he had the opportunity to play them and didn't. And then
11 I think the other source for this was Corey, his cousin, and
12 they played together some, and Corey said this was, I guess
13 when they were about ten years old, that they did play video
14 games, but they were at that time sort of the more rudimentary
15 Nintendo video games that did not require a lot of
16 sophisticated problem solving.

17 So anyway, I'm rambling about this too much. In
18 general, Mr. Wilson did not pursue his leisure time
19 creatively. He didn't show an interest in gaining new leisure
20 skills. He didn't use his leisure as way of expanding his
21 knowledge.

22 Q I think there was mention yesterday that there was a
23 notation in the custodial records, I believe it was Brookwood,
24 maybe some other institution, of a notation that Mr. Wilson
25 spent his time in part playing chess. How does that weigh

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1 into your opinion, if it does, that activity in a custodial
2 setting?

3 A I don't know anymore about it than what you just said.
4 If we come back to the middle age cutoff for mental
5 retardation being 11 or 12, 11 or 12 years olds can play chess
6 and his performance of chess, I really don't know. People say
7 they play chess and they are sort of moving the pieces around.
8 I don't have a way of assessing how sophisticated that was.

9 Q Okay. And then I guess the last area is the work area.
10 What was your conclusion, what does that involve and what was
11 your conclusion?

12 A Well, we discussed this a fair amount earlier. My
13 conclusion was that Mr. Wilson has or had and growing up at
14 the time of the crime, a significant impairment in the
15 adaptive behavior area of work.

16 Q And could you explain why?

17 A Yes. In brief, I mentioned earlier that work involves a
18 lot of things; including all of those skills leading up to
19 work that I listed earlier.

20 And then in the area of the actual performance of
21 work, once someone has found a job is what is the level of
22 sophistication of the job. So, for example, people with mild
23 mental retardation often have an excellent work history when
24 it comes to showing up for work, carrying out their routine
25 activities, very reliably. And I say routine activities,

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1 because it's more likely to be successful if it is a job that
2 does not require a lot of decision making.

3 I mentioned a moment ago common deficits in decision
4 making and judgement and problem solving. On the other hand,
5 if it is a job that has a predictable, routine activities that
6 can be anticipated, not a lot of judgement that has to be used
7 and people with mild intellectual disability can be quite
8 successful.

9 The jobs that Mr. Wilson had that, you know, the
10 documented paid jobs involved manual labor, which certainly
11 would have been within the realm of somebody with mild
12 intellectual ability.

13 Q Now, you assessed all ten of those areas by using the
14 information from your interviews and the information you got
15 from your records?

16 A Yes.

17 Q And then did you also weigh into the balance of your
18 decision making the scoring on the adaptive behavior test that
19 you administered before?

20 A Yes, and that was information that was summarized in the
21 last slide that we showed.

22 Q Okay. And based on all of that information, do you have
23 an opinion to a reasonable degree of psychological certainty
24 as to whether Mr. Wilson is intellectually disabled?

25 A Are you referring to intellectual disability or are you

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1 referring does he have a significant impairment in adaptive
2 functioning?

3 Q Well, let's start first with adaptive functioning.

4 A Yes. All the information that we just reviewed led me to
5 the conclusion that he has a significant impairment in
6 adaptive functioning as he was growing up and at the time of
7 the crime.

8 Q And did you form any opinion overarching issue whether he
9 was intellectually disabled?

10 A I did, and to be clarifying, I did not, as I mentioned
11 earlier, do any evaluation of intellectual functioning myself,
12 I relied upon Dr. James' analysis, her testing. She didn't do
13 an IQ test, but her analysis is of the previous testing.

14 Q Is there anything else other than the specific areas that
15 we have discussed which you think is important to understand
16 in your opinion?

17 A I think the only thing that we might have only touched
18 lightly on, because it is not mentioned in the standard
19 adaptive behavior scales, is that the emphasis upon a person
20 being naive, gullable and influenced by others. And I think
21 that many people described Mr. Wilson as not a leader, but a
22 follower and that he -- you know, as I mentioned earlier, I
23 think I quoted his sister Depetra, you could talk him into
24 anything. The area of naivety with regard to social
25 relationships is something worth mentioning.

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1 Q Are you familiar with the part of the manual which
2 discusses the characteristics of people with intellectual
3 disability who have higher IQ's?

4 A There is a table, actually two tables in the -- actually,
5 I have it here, the user's guide by AAIDD. That, I think,
6 very well summarizes the kind of deficits that Mr. Wilson has.

7 Q And what is the -- this is slide 93 from Dr. Shapiro's
8 PowerPoint, which is Exhibit A in evidence. And is this the
9 table from the chapter that you just referenced?

10 A Yes.

11 Q What is this table based on, is there a research basis
12 for these characteristics?

13 A Yes. I believe that all of them can be found somewhere
14 in the literature related to intellectual ability.

15 Q Is this an attempt to sort of capture what a person at
16 the higher end of the disability spectrum looks like in terms
17 of characteristics?

18 A Yes, that's exactly what it is.

19 Q How, if at all, does Mr. Wilson fit within this profile?

20 A I believe looking at this table what's labeled as table
21 3-1, 3.1, all of these things apply and we have discussed each
22 of them in some fashion or other today.

23 Q Okay. And then is there -- on page 94 of that same
24 PowerPoint slide there is a second table which sort of breaks
25 down within each domain the characteristics of someone at

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1 higher IQ levels who nevertheless would still be
2 intellectually impaired. Are you familiar with that table
3 from the Green Book?

4 A Yes. I think I made reference to this earlier when I
5 said there is a more detailed description of what is meant by
6 each of these three areas, and this is the table to which I
7 was referring.

8 Q And how does Mr. Wilson fit or not fit within this sort
9 of contemplation of what the profile looks like?

10 A I think that -- I mean, we could take the time to go
11 through each one of these, but as I said, I think we've pretty
12 much discussed them, but I think nearly all of them are
13 directly applicable to Mr. Wilson's situation.

14 MR. BURT: Thank you. That's all I have, Doctor.

15 Your Honor, I would move into evidence Exhibit F,
16 which is the binder.

17 THE COURT: Any objection?

18 MR. McGOVERN: No objection.

19 THE COURT: All right. Exhibit F is received in
20 evidence without objection. You may cross-examine.

21 MR. McGOVERN: Thank you.

22 (Defendant's Exhibit F received in evidence.)

23 CROSS-EXAMINATION

24 BY MR. McGOVERN:

25 Q Good afternoon Dr. Olley.

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1 A Good afternoon, Mr. McGovern.

2 Q How are you?

3 A I'm hanging in there.

4 Q All right. Dr. Olley, I want to talk to you a little bit
5 about your retention in this case. There came a time earlier
6 in this year where you were retained by Mr. Burt to provide an
7 expert evaluation of Ronell Wilson; is that right?

8 A Yes.

9 Q Can you tell me when that happened? Not the specific
10 date; was it in 2012, was it 2011 or something else?

11 A I think it was early 2012.

12 Q And you are familiar with Mr. Burt, correct?

13 A Yes.

14 Q You worked with Mr. Burt in the past?

15 A On one other case, yes.

16 Q Do you have any other cases with Mr. Burt?

17 A No.

18 Q So the only case the case you have with Mr. Burt is the
19 Davis case in Maryland; is that right?

20 A That's true.

21 Q And the case in Maryland was successful for Mr. Burt, was
22 it not, Mr. Davis was deemed to be mentally retarded by a
23 District Court Judge in Maryland; is that right?

24 A Yes.

25 Q And you worked with the same team of experts that are

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1 present in this case; is that right?

2 A Yes.

3 Q Ms. James or Dr. James?

4 A Yes.

5 Q And Dr. Shapiro?

6 A Yes.

7 Q And Dr. Woods from California?

8 A Yes. I worked -- if I may, work with is -- Dr. Shapiro I
9 only crossed paths with enough to say hello to in that case;
10 the others I worked more closely.

11 Q Okay. And worked with may not be a fair assessment,
12 would you prefer that you all testified at the same hearing
13 with the same defense attorney asking you all questions?

14 A Yes. Although, just for clarification, all of the
15 experts were sequestered in that case, so we were not present
16 in the courtroom ever at the same time.

17 Q Okay. But for clarification, you all reviewed each
18 other's reports before you testified, correct?

19 A Yes.

20 Q So you were fully aware of what the other folks' opinions
21 were before you sat on the witness stand, right?

22 A Yes.

23 Q And when you were contacted about this case, you knew
24 Mr. Burt and he asked you to take a look at the Wilson case,
25 correct?

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1 A Yes.

2 Q Did you understand him to be representing Mr. Wilson
3 already?

4 A Actually, I didn't meet with Mr. Burt at that time, I met
5 with Ms. Brady. And I think my first contact was with
6 Ms. Brady who told me about this case.

7 Q So it was Ms. Brady who called you up and said, I'd like
8 to retain your services to take a look at the Ronell Wilson
9 case?

10 A No. I was introduced to Ms. Brady by Ms. Greenman, whom
11 I had known previously.

12 Q And who does Ms. Greenman work for?

13 A She works for the Federal Defenders office in Maryland.

14 Q Is that a Capital Defenders or?

15 A I believe so, yeah.

16 Q When you were asked to participate in the case, what
17 information were you provided with?

18 A That there was a case in New York, that it involved the
19 killing of two police officers, that there was likely to be
20 access to witnesses that would be helpful to me in making a
21 decision, and that they were hopeful that there would be
22 sufficient adaptive behavior information to be helpful in that
23 case.

24 Q Okay. And you agreed to get involved in the case,
25 correct?

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1 A I gave it some thought and -- yes, I agreed.

2 Q Well, you gave it some thought because you have so many
3 other Atkins cases going on at the current time?

4 A Because as I mentioned earlier, I'm trying albeit
5 unsuccessfully, to retire, and you can't retire if you keep
6 taking new cases; however, I did agree to take this case.

7 Q Let me see if I understand that correctly. You can't
8 retire until you finish all of the Atkins cases; is that
9 right?

10 A Well, if I'm in the middle of a case that I've obligated
11 myself to, I think that would be my responsibility to see it
12 through, rather than stopping in the middle.

13 Q Oh, I see what you are saying. Have you obligated the
14 university to these cases, is that what the obligation is?

15 A Well, in a sense I'm the only person there that does
16 these cases; although, it's really the university, it's the
17 university with which the government contracts or, you know,
18 whatever entity contracts. There is still an expectation that
19 it's still my services that they want.

20 Q But I'm quite sure the University of North Carolina
21 Chapel Hill is not particularly interested in advancing the
22 cause of Atkins defense; is that right?

23 A I don't think that they have a position on that.

24 Q Okay. All right. So when you enter a new case as a
25 professor at the university as you described with Mr. Burt,

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1 your contract is really with the university, and the
2 university contracts with whoever the attorneys are that you
3 are working for; is that right?

4 A That's true.

5 Q So if you signed up for a case while working for UNC you
6 can't just retire from UNC without complicating the situation
7 with the representation of the case, because money, the money
8 that's supposedly being paid by the defense attorneys are
9 being paid to the university; is that right?

10 A I didn't see it as primarily a matter of money, it's a
11 matter of completing something that I had obligated myself to
12 do.

13 Q Well, when you say you are going to retire, you are
14 suggesting that you are never going to do Atkins work after
15 you retire?

16 A I guess -- I don't know. I'll take that as it comes.
17 What I'd like to do is finish the cases to which I am
18 obligated and see how my life unfolds. I might want to work
19 part-time in the future, I haven't decided that yet.

20 Q Okay. So you are leaving the option open of doing
21 forensic work as a psychological expert in Atkins work after
22 you leave the university, right?

23 A No, I -- well, I mean, that's theoretically possible, but
24 that's not my intention. My intention is to keep working for
25 the university. And if it turns out that I have only enough

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1 work to keep me busy half the time, I'll be a half-time
2 employee.

3 Q Did I misunderstand you when you say you are retiring?
4 Are you retiring from the university or are you retiring from
5 work in general?

6 A I hope both eventually, but...

7 Q Well, I hope so too. But what I'm asking you: If you
8 are going to retire from the university, that means I don't
9 work at the university anymore, right?

10 A Yes.

11 Q But you just said I might be a part-time and I might be
12 with the university. Are you leaving the university or not
13 leaving the university?

14 A I don't have a concrete plan for a date. I guess my hope
15 would be -- I've never discussed this in public before, my
16 hope would be to slowly, you know, wind down so I'm not doing
17 this all the time.

18 Q Okay.

19 THE COURT: I'm hoping to finish this hearing before
20 I have to retire, so could we move along.

21 MR. MCGOVERN: No, I'm moving along.

22 THE COURT: Okay.

23 Q So when you were presented with the possibility of
24 getting involved in this case, you were told that there were
25 witnesses available who could potentially help you with

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1 adaptive functioning, correct?

2 A Sure.

3 Q Sure. Isn't that what you just said?

4 A Yes.

5 Q Okay. So were you presented with information about what
6 Mr. Wilson's IQ was?

7 A No, not that I recall, because the function that -- the
8 discussion would be could I do an adaptive functioning
9 evaluation.

10 Q Well, was it your understanding somebody already jumped
11 past prong one or evaluated him and ascertained that prong one
12 of the standard test for mental retardation had been met?

13 A Calling it prong one assumes there is a sequence. I see
14 adaptive functioning being the most important part.

15 Q Okay. Well, it's a very important part. But if you
16 don't satisfy prong one or prong A or the first prong. You
17 are not going to be found to be mentally retarded or
18 intellectually disabled, right?

19 A Right.

20 Q So when you took on the case, did you have an
21 understanding whether somebody had determined whether or not
22 Mr. Wilson met the requirements of the intellectual deficit
23 prong?

24 A My understanding was the attorneys had access to that
25 information and they felt that that information was

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1 sufficiently strong and there were merits to have an Atkins
2 hearing.

3 Q Okay. And that's obviously not a determination that you
4 made, correct?

5 A Correct.

6 Q Now, ultimately as we see in your report you reach that
7 determination, correct?

8 A Yes.

9 Q Okay. But when you are brought into the case, you're
10 just -- you're being -- you're being told that that prong is
11 going to be satisfied, correct?

12 A The attorneys were obviously optimistic that it would.

13 Q Okay. When the attorneys brought this case to you, did
14 they advise you that somebody had ever diagnosed Mr. Wilson,
15 the defendant here, with mental retardation?

16 A I'm sure at some point in our decision that was raised.

17 Q Okay. And I'm sure -- I think you said on direct that's
18 of no moment to you that prior professional psychologists have
19 never diagnosed him with mental retardation, right?

20 A I wouldn't say it's of no moment, I would say there are
21 certainly instances in which -- and this is also written about
22 widely, that people reach adulthood and are functioning at a
23 level of a person with retardation and have never been so
24 diagnosed.

25 Q Just so the record is clear, you -- when did you agree to

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1 actually work on this case and do the evaluation of
2 Mr. Wilson's adaptive functioning?

3 A Well, I first saw him in April, so I think, you know, it
4 was probably a month or two before that, that I made a
5 decision to work on it.

6 Q Okay. So the timeline is clear, I believe there was a
7 letter sent -- did you know that there was a letter sent by
8 the defense to the Court saying you were going to be one of
9 the experts in this case back in March of this year? Does
10 that sound right to you?

11 A That sounds right. If I saw him in April, then March
12 would make sense.

13 Q So during that period of time, in March and April, you
14 were reviewing information relating to Mr. Wilson's case?

15 A Yes.

16 Q And what types of things would you have been reviewing?

17 A School records. I mean, it's hard to say, because lots
18 of things kept coming in over time, and I continued to be
19 reviewing records. We noted earlier 12,000 or whatever pages
20 is a lot of records, so I think the school records, the
21 Brookwood records. I don't recall exactly which ones came
22 along first.

23 Q And among the information that you were reviewing, you
24 undoubtedly were presented with or had the opportunity to
25 review the reports that were prepared by Dr. Drob, Dr. Sanford

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1 Drob and Dr. Kathy Yates, correct?

2 A Yes. Although, the information from Ms. Yates wasn't
3 labeled as being from her, but I was later told that's where
4 it originated.

5 Q Do you remember how you were presented with this
6 information with the Drop reports and the Yates information,
7 in writing or did somebody tell you about these things
8 verbally first?

9 A In writing.

10 Q Okay. Were you exchanging E-mails with the defense team
11 about what your proposed testimony was going to be?

12 A What my proposed testimony was going to be? My exchange
13 with them more had to do with logistic things, when can we
14 schedule this and so on.

15 Q But you've never E-mailed any of the people at the
16 defense table about matters related to your testimony here,
17 correct, at any time?

18 A I E-mailed them with regard to preparation of my report
19 when was it due and so on, and the preparation for my
20 testimony was, you know, very recently.

21 Q Okay. So you've never -- you never had those types of
22 communications?

23 A Those types of communications is a broad statement.

24 Q Okay. Those types of communications that are related to
25 your testimony. I want to confirm that; it was at issue here.

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1 A Of course I talked to them about what my testimony would
2 be, like, in preparation for being here today.

3 Q Okay. With respect first Dr. Sanford Drob, you said at
4 some point you had an opportunity to review his report,
5 correct?

6 A Yes.

7 Q Okay. And Dr. Drob evaluated the defendant not long
8 after he was arrested for killing two New York City police
9 detectives execution style?

10 A Yes.

11 Q And at that time when Dr. Drob was doing his evaluation
12 of the defendant, did you know that the Richmond County
13 district attorney's office was contemplating seeking the death
14 penalty against the defendant?

15 A Did I know at that time?

16 Q Did you know when Dr. Drob did his analysis or evaluation
17 of the defendant that one of the things that was hanging in
18 the balance when Dr. Drob was doing his evaluation was whether
19 or not William Murphy, the district attorney for Staten Island
20 was going to seek to have the defendant executed?

21 A I assumed that the -- well, because it was an Atkins
22 case, which is a capital case, I assumed when I heard about
23 it, that that was known.

24 Now, the exact sequence of when the decision was
25 made for it to be a capital case, I was not aware of.

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1 Q Okay. Well, taking your assumption, you understood that
2 when Dr. Drob was being asked to evaluate the defendant, he
3 was doing so with an eye towards seeking, let's just call it
4 Atkins --

5 MR. BURT: I'm going to object to that. There is no
6 foundation he knows what Dr. Drob was doing or why he was
7 doing it.

8 MR. McGOVERN: I think he should and I think that
9 it's relevant to his testimony. If he's going to toss aside
10 Dr. Drob's report as being not something he could rely on to
11 the fullest extent, then he should be able to answer questions
12 as to why Dr. Drob's report is unreliable.

13 THE COURT: Overruled. You may answer.

14 THE WITNESS: I'm not sure that -- I lost track of
15 the question.

16 Q I'll help you out. Dr. Sanford Drob evaluated the
17 defendant in 2003 and determined him not to be mentally
18 retarded. You understand that, right?

19 MR. BURT: I object to that, there is no foundation
20 for the question in the evidence.

21 MR. McGOVERN: Are you suggesting that his report is
22 not in evidence? I thought you put it in.

23 THE COURT: It's not in?

24 MR. BURT: The report is in, but the question is
25 that he determined that he is not mentally retarded. I don't

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1 think there is a factual foundation for that. The report
2 simply does not address that issue or that he -- what he did
3 determine or did not determine. It indicates that he had a
4 learning disability, but it does not say he ruled out mental
5 retardation or that he did adaptive functioning testing.

6 MR. McGOVERN: I'm sorry, let me see if I'm wrong
7 about that.

8 BY MR. McGOVERN?

9 Q You understood that Dr. Drob gave the defendant an IQ
10 test, correct?

11 A Yes.

12 Q And he determined the full scale IQ to be 76 points?

13 A Yes.

14 Q You understand that Dr. Drob did not apply the Flynn
15 Effect to that score, correct?

16 A Correct.

17 Q And you understand that Dr. Drob said that the defendant
18 was intellectually functioning in the borderline range?

19 A If that's what it said. I agree, I don't recall exactly
20 what his wording was.

21 Q Okay. Does that have meaning to you, intellectually
22 functioning in the borderline range?

23 A Yes. It means an IQ score that is above the customary
24 cutoff for mental retardation.

25 Q The customary cutoff. So he is basically saying I don't

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1 think he's mentally retarded, I'm reducing it to writing, and
2 I think he's actually in the borderline range, which is above
3 a finding of mental retardation, correct?

4 A Yes.

5 Q Okay. And Dr. Drob also concluded that he actually
6 thought the defendant's IQ score was depressed because his IQ
7 score was being compromised by learning disabilities and other
8 neuropsychological factors, correct?

9 A Earlier you objected to my making that kind of statement
10 about an IQ test. If you'd like me to proceed with it now
11 with the understanding that my function is not to analyze the
12 IQ test but to do adaptive behavior assessment --

13 Q Let me see if I can straighten this out for you.

14 Doctor, you're here testifying in a capital case
15 that that man is mentally retarded, correct?

16 A Yes.

17 Q You're relying on prong one that says he has intellectual
18 disabilities, correct?

19 A I'm relying on Dr. James' interpretation of the prior IQ
20 scores.

21 Q So do you not believe it. Do you not believe that he
22 satisfied prong one?

23 A I do believe it, but I'm telling you where I got that --
24 where I made that decision. I made it trusting Dr. James'
25 review and interpretation of those scores.

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1 Q But you're opining that he satisfies prong one, correct?

2 A Yes. And I want to be clear as to what basis I make that
3 decision.

4 Q Okay. But I'm here. My little job here is to ask you
5 questions about your opining. And so if you're opining that
6 he satisfies prong one, I'm going to ask you questions about
7 that. Do you understand that?

8 A Yes.

9 Q Okay. So I just asked you a prong one question, which is
10 Dr. Drob said that this Defendant has a depressed IQ score
11 related to prong one. That is -- because his score is being
12 compromised by his learning disabilities and other
13 neuropsychological factors. Can you answer that? Is it true
14 that he said that?

15 A It's true that he said that.

16 Q Okay. Did you have that report in your possession or
17 have you -- did you review that report before you wrote your
18 report?

19 A Yes. And I said in my report that I looked at Dr. Drob's
20 findings and I relied upon Dr. James' interpretation of that
21 and previous IQ scores.

22 Q Okay. And putting that in plain English, you did not
23 credit Dr. Drob's findings as much as you credited Dr. James',
24 correct?

25 A Yes. And that statement that you read earlier is related

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1 to what I said quite some time earlier in the day about not
2 stating what the person's potential is; but rather, going with
3 the facts. I am skeptical of when people administer a score
4 and then say well, after the fact it should have been higher
5 for this and that reason.

6 Q I understand. I think I understand. So you are saying
7 -- well, I think what you've said earlier today was in the
8 context of adaptive functioning, right?

9 A Yes.

10 Q And adaptive functioning, your articles are replete with
11 references to the fact it's not what you might be able to do,
12 it's what you are actually doing, right?

13 A Yes, sir.

14 Q So now back on prong one, you're saying you are skeptical
15 of people that say his IQ might be higher than this, because
16 you don't like to talk about potential abilities, you want to
17 know what is the actual IQ, you want it firm, right?

18 A I want a score that's based upon the best scientific
19 knowledge of what that score should be.

20 Q Okay. So, just to finish with Dr. Drob so we can move
21 on, you did not credit Dr. Drob's findings, correct, as much
22 as you did Dr. James'?

23 A I credited them in the context of Dr. James'
24 interpretation of scores that take into account the Flynn
25 Effect and other factors that you are familiar with.

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1 Q And this Dr. Drob that you were not credited as much as
2 Dr. James was a clinical professor at New York University,
3 correct, of psychology?

4 A Yes.

5 Q And at some point you came into contact with the results
6 of an analysis by Kathy Yates, correct?

7 A Yes.

8 Q And Dr. Yates is a Columbia PhD. We're hitting all the
9 local New York schools here. And she did a full academic
10 review of the defendant's academic records, right?

11 A Yes.

12 Q And she did a full review of all of his medical records,
13 right?

14 A Yes.

15 Q And then she offered her findings in the case, correct?

16 A I believe so.

17 Q And she didn't find him to be mentally retarded either,
18 did she?

19 A Apparently not.

20 Q In fact, she said that his problems with learning were
21 the result of a profound learning disability. Does that sound
22 correct to you?

23 A Yes.

24 Q And that he never received a diagnosis of mental
25 retardation, the combination of emotional disturbance and ADHD

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1 led to underachieving potential which led to self esteem
2 problems. Does that sound right?

3 A That sounds like what she said. I wouldn't necessarily
4 agree, again, it's the speculating what his potential is.

5 Q I apologize. That was a bad question. Is that what she
6 said?

7 A Is that what she said?

8 Q Is that what she said? Do you think I read that
9 correctly? Does that sound like what you remember her saying?

10 A I'm taking your word for it, because I read it awhile
11 back.

12 Q Okay. Well, in the interest of moving along, I'm sure
13 Mr. Burt is looking at it, so we'll -- you can assume that I
14 read it correctly.

15 And she also made some comments in that report if
16 you recall about the defendant having a higher potential than
17 his records or his history were showing, that he had higher
18 intellectual potential than maybe his scores were showing.
19 Does that sound right to you?

20 A It sounds wrong, but it sounds like what she wrote.

21 Q Okay. So you are certainly not crediting Dr. Yates,
22 correct?

23 A Not in that regard.

24 Q So you understood that Dr. Yates had evaluated the
25 defendant at the request of the Capital Defenders here in New

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1 York after he was arrested and facing the death penalty,
2 correct?

3 A Yes.

4 Q And you also understood in reviewing her reports that
5 there is really no ambiguity about what she was trying to do
6 because her report is labeled at the top of each page of the
7 academic report, "Lens Toward Meeting the Criteria For Mental
8 Retardation." You read that?

9 A Yes.

10 Q And so on the top of the report of each page of
11 Dr. Yates, it says, "Here's my point, I'm looking at all of
12 this stuff, all of his academic records with a lens toward
13 meeting the criteria for mental retardation." So we know she
14 was actually trying to do the exact same thing you were trying
15 to do or that you did?

16 A Yes.

17 Q And she came up -- she didn't meet the criteria?

18 A Yes.

19 Q In fact, she said some things that you now disagree with,
20 which are to the extent that he's not a high performing
21 intellect, that the reasons for that have something to do with
22 the fact that other factors like his learning disabilities and
23 his ADHD?

24 A Yes.

25 Q Okay. And you reviewed her report before you prepared

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1 yours?

2 A Yes.

3 Q And I'm not going to burden you with going through every
4 single other psychologist or neuropsychologist who has ever
5 sat down to talk to the defendant in this case, but we would
6 agree that none of those other people looking through the lens
7 of mental retardation or not ever deemed him to be mentally
8 retarded, correct?

9 A That's correct.

10 THE COURT: Can we just take a break? Don't move.
11 I want to talk to the court reporter.

12 (Pause.)

13 THE COURT: Okay. We'll continue.

14 MR. MCGOVERN: Thank you, your Honor.

15 Q Now, on your direct examination you were questioned by
16 Mr. Burt about the fact that Dr. Drob did not do any adaptive
17 functioning testing as part of his evaluation, correct?

18 A Yes.

19 Q And have you interviewed Dr. Drob?

20 A No.

21 Q And do you know why Dr. Drob didn't do any evaluation of
22 his adaptive functioning?

23 A No, I don't.

24 Q But you're critical of that, correct?

25 A I pointed out as making it impossible to make a decision

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1 about the mental retardation.

2 Q Okay. If the -- if Dr. Drob determined that the
3 defendant's IQ standing alone did not indicate the necessity
4 of adaptive functioning testing, would you agree with that or
5 disagree with that?

6 A I think certainly that's a legitimate decision to make in
7 that if in his professional opinion this IQ could not be
8 interpreted as, you know, in light of the other factors that
9 we've since talked about, such as the Flynn Effect, if he in
10 his professional decision found that there was no way that
11 this could be interpreted as mental retardation, he would be
12 justified in not having to do an adaptive behavior assessment.

13 Q Okay. So if he didn't use the Flynn Effect in his daily
14 practice and didn't apply it to the 76, you would disagree
15 with that interpretation of the 76? In other words -- I'll
16 withdraw that.

17 Do you think that that 76 should have been Flynn
18 Effected?

19 A I think it should have been looked at in terms of --
20 well. Just as Dr. James did. Which is the practice effect I
21 believe that he had, gosh, something like eight Wechsler
22 scales between the time that he was 6 and 21, so...

23 Q Different variations of that, right?

24 A Yes, but they all have similar features that experts
25 practice effect would regard as something to take into

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1 consideration.

2 Q Well, if that's true, then you would have expected his IQ
3 scores to go up over time, correct, based on practice effects,
4 correct?

5 A Well, that's one factor that would influence IQ scores.
6 There's simply a lot, when you are talking about people with
7 low IQ's, there is a lot of variability from one
8 administration to another, and that can be due to a number of
9 factors. And, you know, given Dr. Drob's qualifications, as
10 you mentioned, I think he was aware of all the things that he
11 might have influenced the IQ score in his judgement, he stood
12 by it. And Dr. James' review of it, she found that it would
13 come within the standard that we now accept for being held for
14 mental disability.

15 Q So you respect or you credit Dr. Drob's opinion in 2003,
16 not to seek adaptive functioning or do adaptive functioning at
17 that time, is that your testimony?

18 A I respect his decision based on the information that he
19 had.

20 Q Fair enough. Because you actually have said in the past
21 when you were questioned about -- about when adaptive
22 functioning is called for, you've said that you wouldn't waste
23 court resources in a case where a person's IQ score was
24 substantially over 70, right?

25 A I don't recall saying that, but it makes sense.

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1 Q Well, let's see if I can --

2 A -- what substantially means.

3 Q I can refresh your recollection. You testified in the
4 Umana case in North Carolina a couple of year ago, correct?

5 A Yes.

6 Q And that was on November 30, 2009?

7 A I don't remember the date, but I'm sure that's correct.

8 Q I'm more doing it for the record. It was before
9 Honorable Robert J. Conrad who is a United States Federal
10 Judge down there in Charlotte, right?

11 A Yes.

12 Q Do you remember that case?

13 A I do.

14 Q That was a case where you testified in an Atkins hearing
15 attesting to the fact that Mr. Umana was mentally retarded,
16 correct?

17 A Yes.

18 Q And on cross-examination in that case at page 121 you
19 were asked the question: "But for this IQ score that
20 Dr. Waynestein (phonetic) came up with of 66, you'd not be
21 giving an opinion of mental retardation without that score
22 would you, based on this data?" And your answer was "I think
23 as a practical matter of efficiently using the Court's
24 resources, if someone came to me and said, here is a person
25 with an IQ that is -- we talked about earlier about the

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1 standard of error of measurement of a score -- a score that's
2 substantially above 70, I would say I don't think it's worth
3 the resources to go looking for adaptive behavior problems;
4 but with a lower score, then yes, it would be." Does that
5 sound like I read that correctly?

6 A Yes.

7 Q And so in that testimony you were saying if somebody had
8 a score that was substantially over a 70, you wouldn't seek
9 adaptive functioning, right?

10 A Yes, and it hinges upon the word "substantially".

11 Q I'm sure you'll have the opportunity on re-direct to
12 explain to us what the word substantially means. But you
13 would agree that that same type of analysis is what informed
14 Dr. Drob when he made the decision not to seek adaptive
15 functioning; is that correct?

16 MR. BURT: Objection to that.

17 THE COURT: Sustained.

18 Q Is that analysis consistent with what you see in
19 Dr. Drob's evaluation of the defendant?

20 A In that we both looked at what we consider to be too high
21 an IQ score to merit going ahead with adaptive functioning
22 assessment, yes.

23 Q And when did the defense team actually let you in on what
24 the actual IQ scores were?

25 A I don't recall.

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1 Q Do you know now? I mean, you knew at the time of your
2 report, didn't you?

3 A Well --

4 THE COURT: You can't over speak over each other.
5 I'm sorry.

6 THE WITNESS: I do know what the scores are now, but
7 I don't recall when they were brought to my attention.

8 Q Did you start your adaptive functioning evaluation prior
9 to finding out what the IQ scores were?

10 A I don't recall. I mean, I had enough information from
11 the defense team that the IQ scores were in the range that
12 would be defensible in court; and exactly when I looked at
13 which scores, I do not recall.

14 Q We're going to talk a lot about this during the course of
15 this cross-examination, and it has to do with what good
16 practice is.

17 Is that good practice to undertake an evaluation of
18 somebody's adaptive functioning without knowing what their IQ
19 score is? Is that is that what everybody is doing out in
20 private practice in the psychological world?

21 A I think it's reasonable to have an idea what the scores
22 are, as you said, to feel justified in conducting an adaptive
23 behavior testing. I don't recall exactly when those, the list
24 of scores, particularly with discussion of how those scores
25 might be interpreted was brought to my attention.

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1 Q So is it -- assuming what you just told us before is
2 right, that you didn't -- that you were taking the defense
3 team's word for what the IQ's were, is it good practice as a
4 licensed psychologist to start an evaluation of somebody's
5 adaptive function, evaluating them for the presence of mental
6 retardation without having a clear understanding of what their
7 IQ actually is; be it in one test or nine tests?

8 A A clear idea? I think part of what this process is, is
9 to determine what a clear idea is. I think it was obviously
10 clear enough in my mind to feel that it was justified to do an
11 adaptive behavior assessment.

12 Q What is the -- you just said what this process is. I'm
13 asking you about what good clinical practice is, and you
14 responded about what the process is. Are you referring to the
15 process of Atkins litigation?

16 A Yes.

17 Q And so you hold yourself out as a little bit of an expert
18 on -- not just being an expert on neuropsychology and all of
19 your multiple accomplishments, but you are an expert at Atkins
20 litigation?

21 A I'm not an expert in neuropsychology, and I'm not an
22 attorney, so I wouldn't claim to be an expert in Atkins
23 litigation.

24 Q Well, you write article on top of article on top of
25 article about Atkins and how one testifies, prepares,

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1 evaluates and otherwise communicates information related to
2 Atkins litigation; is that right?

3 A From the point of view from a psychologist, yes.

4 (Continued on the next page.)
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1 BY MR. McGOVERN:

2 Q Yeah. So you write quite a bit about Atkins, right?

3 A Yes.

4 Q You actually testified on direct quite a bit about your
5 understanding of Atkins and how the rules of the DSM and the
6 AAIDD apply to Atkins, correct?

7 A How I hope they would apply to Atkins, which is to say to
8 rely upon these kinds of accepted standards.

9 Q I'm going to jump ahead for a second. I'm sorry. You
10 just said that you -- you were going to -- testifying about
11 how you hope that these standards would apply to Atkins,
12 correct?

13 A Yes.

14 Q Okay. And on direct, you testified that you were the
15 chair of a committee that was formed to inform the judiciary
16 and the -- your constituency in the psychology world about
17 Atkins, correct?

18 A Yes.

19 Q And your slides that you have used as demonstrative
20 evidence here during this presentation, refer to the 2010
21 standard from the AAIDD, and but also mention the DSM, right?

22 A Yes.

23 Q But you're really advocating for the use of the 2010
24 manual, right?

25 A I think that's probably the best standard that we have

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1 available at this time.

2 Q Okay. And you have written about this, right?

3 A Yes.

4 Q Right. And one of the articles that Mr. Burt handed to
5 us this morning was your 2008 "Implications of Atkins versus
6 Virginia issues in defining and Diagnosing Mental
7 Retardation," right?

8 A Yes.

9 Q And in article that you coauthored with Dr. Everington,
10 you talked about the standard that should be applied, correct?

11 A Yes.

12 Q You have been -- in all of your cases that you have had,
13 you've testified that the standard that should be used is the
14 standard that is adopted by the AAIDD, right?

15 A Yes.

16 Q And you would agree that that standard has actually been
17 evolving over time, correct?

18 A Yes.

19 Q Right? First it was the 1992, when it was the AAMR, and
20 then in 2002, they came out with a new set of guidelines, then
21 we have a 2010 manual, correct?

22 A Yes.

23 Q And you would agree that as that manual evolves and as
24 that organization issues new guidelines, there's greater
25 flexibility within those guidelines for diagnosing people with

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1 intellectual disability. Is that correct or incorrect?

2 A Greater flexibility? I think that would be fair to say.

3 Q Okay. And just so we're clear, when we say greater
4 flexibility, it used to be in the DSM that you had to have two
5 deficits out of ten, I believe, is that right?

6 A Yes.

7 Q Then that was something that was -- the AAMR had
8 advocated for that? That was consistent with their standard?

9 A Yes.

10 Q And then after that, the manual -- I'll refer to as the
11 green book -- the green book actually said you don't need two
12 deficits anymore. You actually only need one deficit in one
13 of the three domains, is that right?

14 A That's right. Although the three domains were not the
15 same as the ten.

16 Q Yeah. Sure. But two is still more than one, right?

17 A Yes.

18 Q Okay. And so you could diagnose somebody with mental
19 retardation based on finding one deficit rather than two,
20 correct?

21 A Yes.

22 Q And that you said, today -- and if I'm putting words in
23 your mouth, please, tell me.

24 Your hope is that this Court will adopt the standard
25 of the whatever the most current manual is, the 2010 or the

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1 2011, whatever supplement, right?

2 A Yes.

3 Q Okay. But the truth of the matter is, Doctor, you have
4 in the past, you have actually testified that in Atkins
5 litigation only the 1992 manual should apply, isn't that
6 right?

7 A I don't recall that, but you can refresh my memory.

8 Q I will. Do you remember this morning when we talked
9 about your state court case?

10 A My state court case? No. Which case would that be?

11 Q The case of -- I guess the People of the State of Ohio
12 versus Danny Lee Hill?

13 A I recall that.

14 Q And in that case, you testified for the government?

15 A Yes.

16 Q And you testified before a judge of a Court of Common
17 Pleas in Trumble County, is that right?

18 A Yes.

19 Q And you testified in a matter that is somewhat similar to
20 this case, in that it involved a defendant who was convicted
21 of capital murder, right?

22 A Yes.

23 Q And he was convicted of capital murder for some heinous
24 crime involving killing a 12 year-old-boy and raping him and
25 doing all sorts of stuff to him and then murdering him, right?

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1 A Yes, in conjunction with another person.

2 Q Yeah. And at that -- you didn't testify at that trial,
3 right?

4 A No.

5 Q In fact, you testified in not 2007, as you said this
6 morning, but in 2004, right?

7 A I don't recall the date, but --

8 Q In October of 2004? You're testified on October 7th and
9 it's October 8th of 2004 in that case? Does that sound right?

10 A Yes.

11 Q And in that case, you testified that Mr. Hill did not
12 have mental retardation, right?

13 A Yes.

14 Q And that you were referred to him this morning I believe
15 during your direction as a "real faker"?

16 A I'm doubt that I used exactly those words, but I did
17 indicate that he was the only person I have evaluated who I
18 believed was genuinely malingering.

19 Q If I'm overstating it, you could tell me, but I think you
20 said he was a faker, but if that doesn't jibe with your
21 recollection, that's fine.

22 So at page 681 of the Hill transcripts, you were
23 asked this question, question, "Did I understand you to say
24 that you think Atkins locks you or requires you to apply the
25 1992 Edition of the AAMR?"

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1 And your answer is, "That is what's cited in
2 Atkins."

3 Question: "Sure."

4 Answer: "And Atkins came out in the same month that
5 the 2002 AAMR Manual came out. So there really wasn't any
6 opportunity in timing for those people who are arguing Atkins
7 to include reference to the 2002 AAMR."

8 Do you recall that testimony?

9 A Well, I don't recall the testimony, but it's a true
10 statement.

11 Q And it was a true statement that you said that you
12 believed that the applicable standard for Atkins litigation
13 that you write so vastly about was the 1992 manual?

14 MR. BURT: Excuse me, could you lay a foundation as
15 to time the statement was made? I may have missed it.

16 MR. McGOVERN: It was October 7th and 8th. I
17 believe that testimony was on October 7th of 2004, two years
18 after Atkins.

19 MR. BURT: Thank you.

20 THE COURT: Go ahead.

21 BY MR. McGOVERN:

22 Q So it was your position at that time that the 1992 manual
23 should apply, despite the fact that the 2002 manual had
24 already been issued?

25 A It was my interpretation of that, of Atkins when I also

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1 recall and it may not have been an exact same time, is that
2 the defense attorney objected and said that I was not
3 qualified to become be commenting on Atkins. I don't know if
4 that was exactly the same time.

5 Q I don't know if that was an answer to my question.

6 My question was, did you say that your opinion was
7 in 2004 that the applicable standard should be 1992 manual,
8 yes or no?

9 A Yes. If you read it in the transcript, I trust that it's
10 correct.

11 Q Okay. Do you remember being at the hearing?

12 A Yes.

13 Q Okay. And do you remember being asked questions?

14 A Yes, sir.

15 Q Okay. So this is -- you don't believe that I'm reading
16 this wrong, do you?

17 A No.

18 Q Okay. But now, we'll hear -- you have told us about the
19 2010 manual on multiple occasions, and we'll talk a little bit
20 more about that.

21 With respect to your involvement in Atkins
22 litigation, you didn't get involved in evaluating MR cases
23 forensically or for criminal courts until 2001, is that right?

24 A No, actually, it was a little bit before that.

25 Q In 2001, the North Carolina legislature passed a statute

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1 that was actually forward-thinking, correct?

2 A Yes, I believe so.

3 Q And they were six months ahead of the Supreme Court in
4 determining that it was cruel and unusual or passed the
5 statute saying, we're outlawing the execution of the mentally
6 retarded, is that right?

7 A Yes.

8 Q Okay. And prior to that time, when you were working at
9 the University of North Carolina, you didn't do as much expert
10 forensic work as you do now, right?

11 A That's true.

12 Q And you did some expert work from time to time, is that
13 right?

14 A Yes.

15 Q But most of it involved Social Security cases, is that
16 right?

17 A No, most of it included special education cases.

18 Q So you did cases where you testified in state court about
19 whether somebody was getting -- a child was getting the
20 appropriate services that they were due to from the state,
21 correct?

22 A Yes.

23 Q And you testified in Social Security cases as well, is
24 that right?

25 A I don't recall that.

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1 Q Well, you testified at the Hill case at page 727 to that.
2 I'll refresh your recollection. All right. I believe it's --
3 excuse me for a moment. (Peruses document.) I won't bother
4 with it.

5 Prior to that, if you did work in Social Security
6 work, you don't remember that, is that right?

7 A Correct.

8 Q Okay. And you did guardian cases, is that right?

9 A I did at least one. I mean, those are hearings before
10 the clerk to, you know, establish whether someone needs a
11 guardian who would be the appropriate guardian.

12 Q Did you testify in federal court prior to that, prior to
13 2001?

14 A Not that I recall.

15 Q And were you known as an expert in the area of mental
16 retardation at that time?

17 A I was -- I had been active in the field for a good many
18 years.

19 Q Mostly on a sort of provincial business, you were known
20 in North Carolina, is that right?

21 A Yes, I suppose so.

22 Q Did you testify outside of North Carolina prior to 2002,
23 when Atkins came down?

24 A No.

25 Q But since that time, you have been involved in Atkins

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1 litigation all over the country, correct?

2 A In several states, yes.

3 Q Your literature is widely read and highly regarded right
4 now among the Atkins bar, is that right?

5 A I hope it's highly regarded, but it's certainly out
6 there.

7 Q Okay. And most of your time, as you said before, is
8 spent doing Atkins cases right now, right?

9 A Yes.

10 Q So the issuance of the Atkins decision actually made a
11 big difference for you professionally, is that right?

12 A Yes.

13 Q And when you -- when you switched over from being a local
14 person to being a larger figure in the Atkins world, did that
15 change your relationship with the university?

16 A No.

17 Q Okay. Well, you said that during your direct examination
18 that you don't take any compensation for the expert testimony
19 that you provide in these cases, is that right?

20 A I don't take any additional compensation. I take my
21 salary.

22 Q Okay. Well, the university receives a fair amount of
23 money as a result of your Atkins work, is that right?

24 A Yes.

25 Q And that benefits you, doesn't you?

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1 A Indirectly, yes.

2 Q Because they allowed to you go on a leave and basically
3 not do anything that a professor at a university does anymore,
4 right?

5 A No. I mean, without getting too lengthy about this,
6 universities are very much in the business of bringing in
7 money these days, which I'm sure you know, for their own
8 survival.

9 So faculty members are expected to generate funds
10 either through research grants or through contracts or through
11 clinical billing or whatever their talents might allow, and I
12 have done all those things at different times, and currently,
13 I'm billing through Atkins cases.

14 Q And you never testified today about this, but how many
15 Atkins cases have you been involved in since 2002?

16 A Involved in? If that means, you know, anything more than
17 a phone call, I would say 35.

18 Q And is it fair to say that that has generated hundreds of
19 thousands of dollars for the university?

20 A I've never counted, but it's probably over a hundred
21 thousand dollars, yes.

22 Q And your relationship with the university has improved in
23 that you have been given an opportunity to go off and do your
24 Atkins work without keeping regular office hours or teaching
25 classes like every other professor at the university?

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1 A I wasn't regularly teaching classes before that, anyway,
2 but yes, I have the freedom to do this rather than to work in
3 the clinic.

4 Q So there are benefits that you derive from testifying in
5 these cases, is that right?

6 A You know, yes. It's a benefit in that I -- this is
7 something that I have chosen to do because I think that it's
8 important. So it allows me to pursue something that is
9 important to me.

10 Q Okay.

11 A And I believe it's important to justice.

12 Q Okay. In your clinical experience, have you worked with
13 people in the prison population on a regular basis?

14 A No.

15 Q When you were working as a -- you have never been in
16 private practice as a clinician, correct?

17 A True.

18 Q You have told me during the voir dire earlier this
19 morning that you have done clinical work and assessments over
20 the years, correct?

21 A Yes.

22 Q But you haven't worked directly with people who are in
23 prison, right?

24 A Correct.

25 Q And you don't have a vast amount of experience other than

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1 your Atkins cases working with criminals, is that fair?

2 A True.

3 Q All right. And the criminals that you have Atkins
4 cases -- have committed the most presumably the worst crimes
5 that the criminal justice system recognizes, but those are the
6 only ones that you have exposure to, right?

7 A Primarily. I mean, I have done other evaluations locally
8 for people whom defense attorneys believed had a disability,
9 and who you were accused of other noncapital crimes.

10 Q And you have had access to studies about what the
11 intellectual makeup is of the prison population in the United
12 States, correct?

13 A Yes.

14 Q You have actually written on these topics, correct?

15 A Yes.

16 Q I think you and Dr. Karen Salekin, I guess you call it a
17 white paper from one of your groups, provided information to
18 the tune of that more than 40 percent of the people currently
19 incarcerated in the United States have an IQ of less than 86,
20 is that right?

21 A Yes.

22 Q And does that number that -- you still think to be
23 correct?

24 A I don't have any newer information.

25 Q Okay. And that's 40 percent of presumably millions -- a

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1 couple million people who are incarcerated in the United
2 States?

3 A Yes.

4 Q And 40 percent of those people have more or almost one
5 standard deviation lower than the average IQ of what we have
6 been told is one hundred in this country, is that right?

7 A Yes.

8 Q So the pool of people who are in prison, by definition or
9 by those -- your statistics or statistics that you put out --
10 is a group have folks who across the board are not operating
11 or functioning at the mean level of average -- or mean
12 functioning of the average person in the United States, right?

13 A Yes.

14 Q And you would agree that one standard deviation, that's a
15 big deal, right? That's a large chunk of points of IQ points?

16 A Yes.

17 Q That's not something that is like, oh, one or two.
18 That's a very big number?

19 A Yes.

20 Q And that's why you put it in your report, right, to make
21 the point -- or your article to make the point that, look,
22 we're dealing with -- incarcerated folks aren't really a fair
23 representation of what the average person in the United States
24 is operating at, right?

25 A Yes.

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1 Q Okay. And we have talked a little bit about learning
2 disabilities during your direct examination. Do you recall
3 that testimony?

4 A Yes.

5 Q And we -- and you have opined about learning disabilities
6 in a limited way. You said that you were an not an expert,
7 right?

8 A Yes.

9 Q And that you are cognizant of the fact that the defendant
10 had been diagnosed throughout his youth and up until Sanford
11 Drob, apparently, with having a learning disability, is that
12 right?

13 A Yes. Yes -- well, no. He was diagnosed as having severe
14 emotional disturbance until he went to Brookwood, and I
15 believe that was the first time he was diagnosed as having a
16 learning disability.

17 Q Did you read Dr. Mapou?

18 A Yes.

19 Q Did Dr. Mapou conclude that this defendant had suffered
20 from learning disabilities?

21 A Yes.

22 Q Would you agree that Dr. Mapou is an expert in the area
23 of learning disabilities?

24 A I believe so, from his credential. I don't know him
25 personally.

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1 Q He's written books on learning disabilities.

2 A Yes.

3 Q I suspect that you're exposed to the testimony that's
4 occurring in this courtroom on a daily basis, is that right?
5 You have some familiarity with what Dr. Shapiro was saying
6 here yesterday?

7 A Very little. I purposely stayed out of the courtroom.

8 Q Well, Dr. Shapiro, yesterday afternoon, testified that
9 Mr. Wilson here could potentially be learning disabled and
10 mildly mentally retarded at the same time. Would that be
11 surprising to you?

12 A I have heard -- would it be surprising that such a thing
13 could occur or would it be surprising that that applies to
14 Mr. Wilson.

15 Q Well, let's unpack that a little bit. Would it surprise
16 you that that was said in this courtroom yesterday?

17 A No.

18 Q Because you heard that that was said here yesterday, is
19 that right?

20 A I believe I did, yes.

21 Q And you don't agree with that, right?

22 A I don't have a position on that, because I didn't do an
23 evaluation of learning disability, and I don't consider myself
24 to be an expert in learning disability.

25 Q But you know that it's virtually impossible to be

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1 learning disabled and mentally retarded at the same time, is
2 that right?

3 A Many people have asserted that that is possible. I have
4 not really looked into it.

5 Q Well, let's deal with the concrete then. Do you believe
6 that the defendant is learning disabled and mentally retarded
7 at the same time?

8 A I don't know.

9 Q Do you agree with Dr. Shapiro that he has a learning
10 disability and he's mentally retarded at the same time?

11 A I don't have an opinion on that. I didn't do an
12 evaluation of learning disability. I'm not an expert on
13 learning disability. I haven't discussed it with Dr. Shapiro.
14 I don't know.

15 Q But Doctor, that's relevant to your opinion, is it not?
16 I mean, your saying that he is mentally retarded, right?

17 A Yes.

18 Q And you want this Court to believe that he's mentally
19 retarded?

20 A Yes.

21 Q And somebody else has testified that he has a learning
22 disability, and that he could be mentally retarded and have a
23 learning disability at the same time?

24 A Yes.

25 Q You say you can't answer that question, right?

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1 A I can't answer that question specifically with regard to
2 Mr. Wilson.

3 Q Well, you're an expert in mental retardation. So I guess
4 I'll ask you. Do you believe that it's possible to have a
5 learning disability and be mentally retarded at the same time?

6 A No, I commented earlier that the definition of learning
7 disability seems to change frequently. The -- so I guess it
8 depends on what definition of learning disability one is
9 currently embracing.

10 Q Well, in the Davis case that you testified for
11 Mr. Burt -- excuse me, testified in response to Mr. Burt's
12 questions -- you were asked this very question. Do you recall
13 that?

14 A No.

15 Q Well, at page 182 of the Davis transcript, the bottom of
16 page 182, the question was, "Can a learning disability coexist
17 with mild mental retardation?"

18 And your answer was, "Well, that's a dispute and
19 whereas the definition of mental retardation has been pretty
20 standard for a good many years, the definition of learning
21 disability has been more up for debate. But in general,
22 learning disability is an individual of average intelligence,
23 who has a deficit in one narrow area that has implications for
24 academic purposes, whereas mental retardation is someone with
25 significantly impaired general intelligence. So you're

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1 looking at a broader impairment across many areas. I'm not
2 sure if I answered the question."

3 So they posed it again to you: "In this case, is it
4 accurate to say that Mr. Davis should be diagnosed with a
5 learning disorder, but not mild mental retardation?"

6 Answer: "Well the DSM indicates that you can't have
7 both. So that's one authoritative point of view of that. You
8 can imagine it would be very hard to have both, because if you
9 have say an IQ of 70, the learning disability has been
10 typically defined as a discrepancy between intelligence and
11 performance on an academic scale. So a person with an IQ over
12 70, the usual discrepancy is that it's been cited over the
13 years is 15 points or one standard deviation. So to have a
14 learning disability and an IQ of 70, academic skills would
15 have to be at about a 55. Now, Mr. Davis doesn't have that
16 big of a discrepancy, so it doesn't fit that he had -- that he
17 doesn't have average intelligence."

18 Do you remember giving that testimony?

19 MR. BURT: Excuse me?

20 MR. MCGOVERN: Do you want the witness to finish.

21 MR. BURT: You left out the end of the answer, which
22 I think is important.

23 MR. MCGOVERN: It was important to Davis. I'll read
24 it.

25

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1 BY MR. McGOVERN:

2 Q "Davis doesn't have that big of a discrepancy, so it
3 doesn't fit that he -- he doesn't have average intelligence
4 and he doesn't have a discrepancy between intelligence and
5 academic functioning of a standard deviation. So that by that
6 definition of learning disability, he doesn't fit it."

7 Do you recall giving that testimony?

8 A Yes.

9 Q So given that testimony and what I presume you've read in
10 the DSM, isn't it extremely rare or you say never, to have a
11 learning disability coexisting with mental retardation?

12 A If you embrace that definition that you just described --

13 Q With due respect, that you just described?

14 A If we embrace that definition, then yes, I would agree
15 with that; however, Dr. Mapou, for example, rejected the DSM
16 and acknowledged, as you said that he is an expert, that he
17 has a different definition of learning disability. So my
18 point is simply it depends on which definition you are using.

19 Q No, Doctor, with all due respect, Dr. Mapou didn't make a
20 determination about coexistence or co-morbidity. He said he's
21 not mentally retarded, referring to the defendant. So that
22 has nothing to do with whether or not you can be mental
23 retarded and the learning disabled at the same time, right?

24 A Right.

25 Q Dr. Mapou said he's learning disabled and operating in a

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1 below average to borderline range, right?

2 A Yes.

3 Q And so Dr. Shapiro's statement that the defendant could
4 have a learning disability and mild mental retardation is
5 borderline absurd, correct?

6 A I was not present for his testimony, but if he's
7 embracing a different definition than the one I said and that
8 you quoted from then, as I said, I'm not an expert in learning
9 disabilities, and newer definitions may incorporate or may be
10 such that the two could coexist.

11 Q Okay. Well, just for the record and for your
12 edification, I'll read it, and ask if this sounds right to you
13 from the DSM.

14 At page 47 of the DSM, which we have quoted at
15 length in this case, "A learning disorder or communication
16 disorder can be diagnosed" --

17 THE COURT: Slowly, please?

18 MR. McGOVERN: I apologize.

19 BY MR. McGOVERN:

20 Q "A learning disorder or communication disorder can be
21 diagnosed in an individual with mental retardation, if the
22 specific deficit is out of proportion to the severity of the
23 mental retardation."

24 That sounds a lot like what you said in the Davis
25 case, doesn't it?

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1 A Out of proportion? Yes, it does --

2 Q There you go.

3 A -- if that was your question. Out of proportion, I think
4 has room for interpretation.

5 Q Certainly. Doctor, did you agree with the proposition
6 that if you are unable or if a diagnosis does not satisfy the
7 first prong of the definition of mental retardation, that is,
8 a person operating or functioning at either a below a 70 or
9 for the manual purposes, more than approximately two standard
10 deviations below the mean, if you don't satisfy that, that the
11 analysis of mental retardation is over?

12 A Yes, because you have to have all three of the, as you're
13 referring to them, prongs.

14 Q So in this case, if the IQ of the defendant is not
15 demonstrated credibly to be within that range of 70 to 75 or
16 even the more flexible range of the manual, there's no need
17 for adaptive functioning, correct?

18 A Correct.

19 Q There's no diagnosis of mental retardation, correct?

20 A Yes.

21 Q There may be a diagnosis of learning disabilities, right?

22 A Again, I don't -- the definition -- current definition of
23 learning disability is not something I should be speaking to.

24 Q And nor should I. Would you agree he's got some other
25 problem other than being mental retarded, if his IQ is not in

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1 the range that it needs to be in, right?

2 A Yes. That's pointed out in AAIDD and other sources that
3 one may have a significant impairment in adaptive functioning,
4 but not meet the intellectual disability or the intellectual
5 deficit requirement, and thus not have a formal diagnosis of
6 intellectual disability.

7 Q Okay. And so they're not mentally retarded or whatever
8 term is less pejorative?

9 A Yes.

10 Q I apologize if I'm offending you by using the mentally
11 retarded thing. It's just what the Supreme Court says.

12 A Yes.

13 Q So you reviewed the IQ tests that were done in this case,
14 correct?

15 A Yes.

16 Q At some point?

17 A Yes.

18 Q When would you say they let you in on what the actual IQ
19 data was? Within the past couple weeks or was it before the
20 report?

21 A Well, if you mean the actual IQ data, taking into
22 consideration all these factors that we talked about, such as
23 the Flynn Effect and Practice Effect and so on, then, yes,
24 within the last few weeks.

25 Q I think, just so you and I are clear going forward, the

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1 Practice Effect, are you saying that the Practice Effect is a
2 reason to adjust scores?

3 A I don't like the word "adjust." A score should be
4 interpreted in light of the Practice Effect.

5 Q It should be interpreted in light of Practice Effect of.
6 Does that mean like interpreted in the course of using your
7 clinical judgment?

8 A Yes, and in light of what the presenting question is.

9 Q So the Practice Effect should be the component of the
10 clinician's decision about whether to, let's say, order up
11 some adaptive functioning testing, correct?

12 A Yes.

13 Q Right?

14 A Yes.

15 Q But in your view, it's not a reason to artificially
16 reduce a score, right? Like an IQ score? You wouldn't
17 artificially reduce a score, right?

18 A Artificially reduce implies that you're sort of secretive
19 about what the original score had been.

20 Q Let's be less secretive about it. You wouldn't reduce an
21 IQ score because of a Practice Effect, right?

22 A You would -- I'm sorry. I don't mean to sound like I'm
23 being evasive. You would, depending upon the question, take
24 it into consideration. The question here is one of diagnosis
25 and it's a life or death matter. So one wouldn't want to rush

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1 to make a decision. One would want to consider everything.

2 There might be other matters in which, for example,
3 rules would tie your hands to not be able to consider all of
4 these factors, in which case you have to operate under the
5 rules of the circumstances that you're working in.

6 Q So you don't reduce IQ scores because of Practice
7 Effects, right?

8 A Well, the Practice Effect isn't something even -- it
9 isn't as precise as, for example, the Flynn Effect, because
10 the Practice Effect is known to inflate scores, but there's no
11 formula that says if you take this test, this often, this much
12 time in between tests, that it will inflate the score by this
13 number of points. It's much more, as you said, a matter of
14 judgment.

15 Q Okay. And so I'm going to ask the question again, and I
16 apologize for doing this. Do you reduce IQ scores because of
17 Practice Effects?

18 A No. You take them into consideration. You can offer it
19 as an alternative score, as the what might have been -- how
20 the Practice Effect might have affected a score.

21 Q All right. How about this? Has Dr. James reduced IQ
22 scores in this case, under her analysis, based on Practice
23 Effect?

24 A My understanding is that she has offered an
25 interpretation in light of the IQ scores -- excuse me, in

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1 light of the Practice Effect.

2 Q And but you don't advocate for reducing the score based
3 on Practice Effect, right?

4 A No, it's not that simple. Yes, you're right. I wouldn't
5 just say, take away this number of points.

6 Q Because it's very difficult to quantify, correct?

7 A Yes.

8 Q Right? Some Practice Effect might affect one person more
9 than it affects somebody else, right?

10 A Yes.

11 Q Just like that Flynn Effect and we'll get to later.

12 The Flynn Effect, that changes from country to
13 country, right?

14 A There are -- the data are different in different
15 countries, different times, different tests.

16 Q Okay. Well, let's -- I just want to talk to you about
17 these IQ tests first. And if I may, I think this was
18 admitted. This is your last entry in your binder of Exhibit
19 F, which is the list of IQ scores for the defendant.

20 THE COURT: It's going to be on the screen.

21 THE WITNESS: Thank you.

22 BY MR. MCGOVERN:

23 Q See that?

24 A Yes.

25 Q Dr. Olley, and you have seen this document before,

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1 correct?

2 A Yes.

3 Q And this is this is Dr. James' accounting of the IQ
4 scores that the defendant had as part of his academic and
5 medical history, correct?

6 A Yes.

7 Q And you understand that yesterday in this courtroom,
8 there were some adjustments made to this data, but for our
9 purposes, this looks like the document that you relied on when
10 you were opining about the defendant's mental retardation,
11 right?

12 A Yes.

13 Q All right. I don't want to get into the nitty-gritty
14 with you on this, so I'm just going to put a highlighter right
15 down the middle. All right? And that's the full scale IQs.
16 You see that?

17 A Yes, I do.

18 Q All right. Now, that's before Flynn, right?

19 A Yes.

20 Q That's before Practice Effect considerations, right?

21 A Yes.

22 Q That's -- those are the -- those are the IQs that,
23 assuming that everybody followed the rules that Wechsler
24 promulgated, those are the scores that the protocols produced
25 when the defendant was tested with IQ, correct?

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1 A Yes.

2 Q And you saw these scores at some point before you wrote
3 your report, right?

4 A Yes.

5 Q And you would agree, looking at these scores, that but
6 for that score in December of 1994, Mr. Wilson doesn't appear
7 to satisfy prong one of this -- of this mental retardation
8 analysis. Would you agree with that?

9 A That would be one's first impression, looking at the
10 scores that you highlighted.

11 Q And was that your impression when you saw these scores,
12 when they were finally revealed to you?

13 A Well, I think that they were finally revealed to me -- I
14 don't recall. It was in light of discussions of these other
15 factors. So I -- my expectation was that these scores would
16 be interpreted to give more, as you said, flexibility to the
17 diagnosis of intellectual disability.

18 MR. BURT: Could we clarify that when the question
19 and the answer, "referring to these scores," he's referring to
20 the highlighted scores, the unadjusted scores?

21 MR. McGOVERN: That's fine.

22 THE COURT: That the Court's understanding.

23 MR. BURT: Thank you.

24 BY MR. McGOVERN:

25 Q So the unadjusted appear -- it's only 1994 that would put

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1 you in the mental retardation range, right?

2 A Yes. Although I have worked in other jurisdictions in
3 which scores, such as the 76 by Dr. Drob, would have been
4 regarded as an acceptable score. And that was the score that
5 was closest to the time of the crime, so that one caught my
6 eye, as well.

7 Q You worked in jurisdictions that apply a different set of
8 rules than the DSM and the manual?

9 A No. For example, in California, to -- a 75 is, well,
10 essentially the same thing as being argued by Dr. James, that
11 75 is the cutoff and if you take into consideration the
12 Practice Effect and any other --

13 Q Adjustments down that you might want to apply, right?

14 A -- that's your wording and not mine, but I understand
15 what you're saying.

16 Q Okay. But that California rule, is that by statute,
17 right?

18 A I think that's just the interpretation of the courts as
19 has been explained to me by attorneys there.

20 Q You have testified in federal court about a 76 being good
21 enough for mental retardation?

22 A No, that's a case that's still pending.

23 Q But you must have been a little concerned when you saw
24 these IQ scores, right? When you started your adaptive
25 functioning analysis, they finally give you the IQ data and

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1 this, you would agree, is not a very strong case for meeting
2 prong one, right?

3 MR. BURT: Object to the --

4 THE COURT: Sustained.

5 BY MR. McGOVERN:

6 Q You would agree, sir, that those scores there -- and we
7 can leave off the one on the bottom because that's
8 Dr. Denney's -- but the scores from 1989 to 2003 do not make a
9 very compelling case for a person suffering from mental
10 retardation, correct?

11 A Those scores, as you know, the scores in the highlighted
12 column, the original scores, do not make a compelling case.

13 Q But -- or excuse me, not even the 71 is not even that
14 compelling, because you have to employ a band of competence on
15 that 71 to put you into the mental retardation range, right?

16 A Yes.

17 Q And by that, so the record is clear, I'm talking about a
18 71, standing alone, you would agree is not indicative of
19 mental retardation, right?

20 A No, but what attracted me to participate in this case is
21 that when the IQ scores are close, to me, it's worth while
22 taking a look at adaptive functioning.

23 Q That may well be true as to why you were interested. I'm
24 just saying to you, a 71, until you put a band of competence
25 around it, doesn't get you into MR range. Is that right or

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1 wrong?

2 A Well, it's wrong in a sense that you earlier invoked
3 standard practice or best practice, and using competence
4 intervals is best practice. It's part of what is generated on
5 the protocol for the test.

6 Q And did you employ that best practice of using band of
7 competence when you testified in the Danny Hill case that left
8 Mr. Hill on death row?

9 A I think that the agreement was that he did have a
10 significant impairment in intelligence, that the judge offered
11 that opinion.

12 Q My question was, did you imply a band of competence when
13 you testified in that case?

14 A I don't recall, because Mr. Hill's tested IQ was in the
15 fifties, so he was known to -- really wasn't necessary.

16 Q Well, let me see if I can refresh your recollection,
17 then. At page 548 of the Hill transcript, the Court, the
18 judge, asked you, "That's why I said spread. So in other
19 words, if it was at 70, if you put it, if you took six points,
20 for example, it would be 73 or 67?"

21 And you answered, "Yes."

22 The Court said, "What happens if it's a 67 on the
23 Stanford-Binet?"

24 And you answered, "Well, that would then fall below
25 the cutoff for mental retardation." Because for the cutoff

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1 for mental retardation is 68 on the Stanford-Binet, correct?

2 A On that version of the Stanford-Binet.

3 Q Getting back to the transcript. You again: "But we're
4 talking and this is a distinction that's important when you do
5 evaluations for the purpose of designing services for people,
6 because we don't look for an absolute cutoff. We look for the
7 big picture of what services does this person need. Atkins
8 does not, in my understanding of it, address the standard of
9 error of measurement. In other words, it doesn't say that you
10 can take and obtain a score and then put a band of competence
11 around it. So that's something for us to decide, whether
12 that's acceptable or not."

13 Question: "Now, is it fair to state that what we
14 know now with all the records that we have, that it would be a
15 pure speculation to go and say Danny Hill's a 70, is a 73 or a
16 67. There's no way of knowing, is there."

17 And your answer was, "No."

18 Do you recall that testimony?

19 A Yes.

20 Q All right. And so, I don't want to unfairly summarize
21 that, Doctor, but when you were looking at Danny Hill's 70 on
22 the Stanford-Binet -- do you recall that?

23 A Yes.

24 Q Right? Am I misrecalling (sic) that he had a 70 on the
25 Stanford-Binet?

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1 A That was an earlier score. It wasn't the one that --

2 Q It was in 1973, right?

3 A I don't recall the exact date. I'm just distinguishing
4 it between the testing that was done at the time of that
5 hearing versus an earlier score.

6 Q You advocated -- testified at this hearing that a band of
7 competence -- placing a band of competence around his score of
8 a 70 was appropriate. Correct or incorrect?

9 A I don't recall doing that, but if that's what the
10 report -- that what's the transcript indicates, then I did.

11 Q So you've testified in the past that all of these things
12 on the entire right side of this chart, band of competences
13 are -- amount to pure speculation, correct?

14 A Did I say pure speculation?

15 Q Let me be fair. 549 again. Question: "Now, is it fair
16 to state that what we know in all the records that we have,
17 that it would be pure speculation to go and say, Danny Hill's
18 70 is a 73 or a 67. There's no way of knowing, is there."

19 Answer: "No."

20 MR. BURT: Well there's two questions there, so I
21 don't think that question is --

22 THE COURT: You can argue it.

23 MR. BURT: Sure.

24 THE WITNESS:

25 A I regret having -- I'm agreeing it's poor --

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1 BY MR. McGOVERN:

2 Q Don't apologize to me. Apologize to Mr. Hill, who is on
3 the row.

4 THE COURT: Just let him answer the question,
5 please.

6 Go ahead, Doctor.

7 A You know, part of the reason we engage in these things is
8 to continue to learn, and I think that I have learned things
9 from previous cases and learned things from my colleagues. I
10 don't know that I would at this time, regard standard error
11 are measurement or statistics derived from it as speculation.

12 Q Doctor, that was in 2004, right?

13 A Yes.

14 Q You think you have learned since then?

15 A Certainly hope so, yes.

16 Q You think you've learned by 2010?

17 A You mean on this specific topic?

18 Q Yes.

19 A Yes, I believe so.

20 Q You were deposed in 2010 in the Danny Hill case, were you
21 not?

22 A Yes.

23 Q Presumably, you had learned all about this band of
24 competence, correct?

25 A Yes.

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1 Q Did you correct your testimony during that deposition?

2 A No, I don't recall during that deposition that there was
3 discussion of IQ at all. It was about adaptive functioning,
4 because there was agreement that Mr. Hill met the IQ standard
5 for intellectual disability.

6 Q And you know that the reason that deposition was held was
7 because of an affidavit you filed in that case, correct?

8 A Yes.

9 Q And in that affidavit, you said there were other certain
10 other things you would have liked to have considered before
11 you had rendered your position -- your opinion in 2004,
12 correct?

13 A Yes.

14 Q You didn't mention anything in that affidavit about your
15 misapplication of the standard of error?

16 A No. My focus on that was about his adaptive functioning.

17 Q So if --

18 MR. McGOVERN: Does Your Honor want to take a break
19 or I can keep going?

20 THE COURT: Keep going for a few more minutes, if
21 you will.

22 BY MR. McGOVERN:

23 Q All right. So back to the IQ, looking at those IQs in
24 the full scale column, Doctor, you would agree that the
25 December 1994 is the most significant number as it relates to

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1 potentially offering a diagnosis of mental retardation,
2 correct.

3 A Yes. You did say December?

4 Q Did I? I'm sorry.

5 A No, it is. I think it is December. I misheard you, I
6 think you said September, but we're talking about the same
7 thing.

8 Q Okay. As it turns out, in your report and in reports of
9 all your colleaguings, this December of 1994 is really the only
10 IQ score that you want to rely on or that you rely on, is that
11 right or relied so heavily on?

12 A I'm not prepared to testify in any detail about the IQ
13 scores. My understanding strictly from Dr. James' record is
14 that that score and the 2003 score are the ones that she has
15 relied upon most heavily, and she has obtained consultation
16 from other experts in order to make that decision.

17 Q Respectfully, Doctor, you dedicated pages of your report
18 in this case to why the 1994 test should be honored and
19 credited, and why the other IQ tests, such as the one done by
20 Dr. Drezner or -- Kara Drezner should not be credited, right?

21 MR. BURT: I'm going to object to that. Misstates
22 the report. Page eight has one paragraph on this issue.

23 THE COURT: You may answer.

24 A Agree that I think I discussed it very little. (Peruses
25 document.)

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1 BY MR. McGOVERN:

2 Q Page eight dedicates the entire page to assessment of IQ.

3 Am I right or am I wrong? I'll ask the witness.

4 A (Peruses document.) Yes.

5 Q And you say that you were not prepared to offer us an
6 opinion about what the applicable IQ score should be?

7 A I'm testifying that I have I -- the information that I
8 have is what's indicated in my report, and that I relied most
9 heavily upon Dr. James' opinion.

10 Q In doing so, you reviewed the IQ scores, right?

11 A Yes.

12 Q And you analyzed the IQ scores?

13 A To the extent that it appears in this report.

14 Q Well, let's go out -- let's not look at the report.

15 You sat here this morning -- and correct me if I'm
16 wrong -- and told the whole story about you going to meet with
17 Kara Drezner, right?

18 A Yes.

19 Q Kara Drezner did not offer any adaptive functioning
20 information about the defendant, did she?

21 A No.

22 Q No. Her entire interview was about the way that she
23 administered that IQ score in 1991 that gave the defendant a
24 full scale IQ of 78, right?

25 A Yes.

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1 Q And you threw out her entire or invalidated her IQ score,
2 is that right?

3 A I wouldn't say I threw it out or I invalidated it. I
4 just pointed out these are areas that should be taken into
5 consideration.

6 Q All right. So that testimony, you would agree, is
7 extremely relevant to the question of whether or not this
8 defendant satisfies prong 1, prong A, prong C, call it
9 whatever you want, that he has an actual intellectual deficit,
10 right?

11 A It is relevant to her score, yes.

12 Q So that was testimony related to the IQs, right?

13 A Yes.

14 Q Okay. So when you sit here and tell me that you're not
15 prepared to testify about IQs, that's not really true, right?

16 A I testified to the extent that I know about it, about her
17 IQ score. She happened to be available in the day that I was
18 there, and I spoke to her. I did not speak to the other
19 individuals who conducted IQ testing.

20 Q Okay. So if we're going to -- if I can reduce your
21 testimony on prong one, is that you're here and you're opining
22 that the defendant is mentally retarded, right?

23 A Yes.

24 Q And that you don't know really too much of anything about
25 whether or not he satisfies prong one of the mental

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1 retardation analysis, right?

2 A That's a strong way of stating it. I'll just restate
3 that in addition to the information that is on page eight, I
4 relied upon Dr. James' judgment.

5 Q I don't -- I'm not asking you whether or not you relied
6 on her judgment. I'm asking you as a professor of the
7 University of North Carolina, as a guy who professes to know a
8 ton about Atkins litigation and these cases, and that you have
9 done all of this clinical work, are you prepared to offer an
10 opinion whether or not that defendant has an intellectual
11 deficit?

12 A Yes. I have opined such.

13 Q Okay. So would it be okay with you if I asked you some
14 more questions about whether or not you consulted these IQ
15 scores before you offered that opinion?

16 MR. BURT: The question is argumentative.

17 THE COURT: I'm sorry?

18 MR. BURT: The question is argumentative.

19 THE COURT: Just ask the questions. If there is an
20 objection, I'll deal with it.

21 BY MR. McGOVERN:

22 Q Are you prepared to answer some questions about these IQ
23 scores?

24 THE COURT: Just ask your questions.

25 MR. McGOVERN: Yes? I'll ask my question.

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1 BY MR. McGOVERN:

2 Q Doctor, would you agree that the only person who
3 administered an IQ test to the defendant and found or --
4 excuse me. I'll withdraw that.

5 Would you agree that the only person who noted a
6 reason not to trust the IQ score in their IQ test was
7 Dr. Nagler in 1994?

8 A No. I'm -- not to trust the score? I think the other
9 was Dr. Giglio, because there was a large discrepancy between
10 verbal and performance.

11 Q Well, that's a DSM issue. I'm talking about as a matter
12 of behavior in actually taking the test, that it was only
13 Dr. Nagler in December of 2000 -- December of 1994, who said
14 there may be some reason not to trust this score. Do you
15 agree with that or not?

16 A Yes, I think the other statement like that were in the
17 opposite direction of people saying he has more potential. So
18 there were other comments to distrust the score, but they were
19 in the opposite direction.

20 (Continued on the next page.)
21
22
23
24
25

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1 Q Okay. Well these my next question. Wouldn't you agree
2 that everybody else who gave this gentleman an IQ score said
3 that he actually had more potential than his IQ was --
4 reflected?

5 A They did say that.

6 Q That's not an unusual thing, correct? If somebody is
7 suffering from learning disabilities, hypothetically, and they
8 have a problem reading, they're going to have a lower verbal
9 score; is that right?

10 A I don't think that that's an absolutely firm pattern; but
11 then again, I'm deferring to others' expertise on learning
12 disabilities.

13 Q Would you agree that if somebody has functional academic
14 problems, or academic problems, that their verbal IQ may be
15 adversely affected by that? Correct?

16 A I don't -- no, I don't think that's the way labels work.
17 They're just -- well, again, there's so much disagreement
18 within the learning-disabilities field; and for quite a few
19 years in our center, there were people whose primary interest
20 was learning disabilities. I wasn't one of them, but I'm
21 close enough to know the disputes that exist there.

22 And to say it's because of a learning disability --
23 I think it's just a description of what later then gets
24 labeled as a learning disability.

25 Q So do you agree or disagree with the nine -- I'm trying

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1 to count them -- the eight -- excuse me.

2 Do you agree with -- disagree with everybody on that
3 list who says that the defendant's intellectual potential was
4 being understated by his IQ score?

5 A I believe that that is not a statement that can be
6 verified in any scientific way. That's the opinion of the
7 person that was administering the test. And presumably there
8 was something in that person's demeanor or something that made
9 the person administering the test feel that the person's best
10 performance was not being obtained.

11 Q And would you agree with the premise that if you're
12 legitimately diagnosed as being mentally retarded, the
13 possibility of growing out of mental retardation is virtually
14 zero?

15 A Growing -- if you mean by that, simply passage of time
16 and maturation, that is -- I wouldn't say zero, but it is
17 unlikely. The most likely scenario that's noted by the AAIDD,
18 and others, is that people learn, if they are in an
19 appropriate services; and particularly in the area of adaptive
20 behavior, people can improve their adaptive behavior such that
21 they would become more independent and would no longer
22 technically meet the criteria for diagnosis.

23 Q So if I understand that correctly, you're saying their IQ
24 shouldn't change, correct?

25 A Well, their IQ does change; and you can see the

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1 variability in these scores --

2 Q Well, that's a good question.

3 A -- due to a lot of factors.

4 There are several factors that affect the repeated
5 scores. And this is important in Atkins cases because, like
6 Mr. Wilson, many Atkins cases have people who have variable
7 scores, some above or below a cutoff; and, therefore, there is
8 a process such as we're doing today to try to resolve what a
9 proper diagnosis should be.

10 Q Would you agree that, theoretically, a person's IQ should
11 stay the same throughout their lifetime?

12 A Only theoretically, in the sense that there are theories
13 of the nature of intelligence but IQ scores are measures of
14 actual human behavior over time and they would be expected to
15 vary.

16 Q Looking at these IQ scores here, without Flynn affecting
17 them and bands of confidence, you would agree that other than
18 that 1994 score where he posted a 71, his IQ scores, his
19 full-scale IQ score, is relatively consistent, as a high 70's
20 to low 80's?

21 A Well, if you throw out the highest scores and the lowest
22 scores, that's what you would wind up with.

23 Q And without any more manipulation, that -- those numbers
24 there, putting aside the 71, would not satisfy the prong --
25 the prong for intellectual deficits, right?

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1 A If you took them strictly at face value, as you said
2 before, how the score that you would obtain if you used a --
3 the scoring manual for a Wechsler scale, then these results
4 would look, to me, too high for a diagnosis of mental
5 retardation.

6 Q And if I were to tell you that in the *Hill* case, you
7 testified four separate times that IQ should theoretically
8 stay the same throughout one's life, would you -- would you
9 agree with that, or would you like me to read you each and
10 every instance?

11 A No. As I said, theoretically, IQ is a very stable trait.
12 In reality, it can vary. The score -- I mean, IQ is a score
13 on a test. Intelligence is a trait of the person. And
14 intelligence, in theory, should remain a stable trait.

15 Q And that in a typical circumstance, you would expect that
16 mental retardation is a condition that would continue
17 throughout your life?

18 A In most circumstances, that's true.

19 Q So in this circumstance, you would expect that if the
20 defendant was mentally retarded when he was 12, he would be
21 mentally retarded when he was 20, mentally retarded when he's
22 30, correct?

23 A Well, unless he falls in that category that I was
24 mentioning earlier of a person who has appropriate
25 opportunities to improve adaptive functioning, and the score

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1 would go above whatever the cutoff is, the person would
2 technically no longer meet the criteria.

3 Q But that's -- he doesn't even have that problem because
4 but for the 71, all of his scores would be outside of the
5 mental retardation range, correct?

6 A Just using the scores that you have highlighted, that's
7 true.

8 Q Okay.

9 And, Doctor, you understand that Dr. Nagler is
10 deceased, correct?

11 A Yes.

12 Q All right.

13 And, therefore, she was unable to be interviewed
14 for -- in preparation for this case, correct?

15 A Yes.

16 Q All right.

17 And you went out and you interviewed, you said
18 Dr. Drezner. Did you interview any of these other doctors?

19 A I did not.

20 Q Now, you went to go see Dr. Drezner because you wanted
21 find out how she got that score?

22 A To be honest, I think it was a matter of convenience that
23 she was available. I would have talked to other people; but I
24 was thinking, Well, my focus is really not on IQ, but because
25 she was available, I would speak to her.

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1 Q Well, did the -- did the defense team provide you with
2 the results of her IQ test before you went to go visit her?

3 A Yes.

4 Q All right.

5 A I had her report.

6 Q So at least at that time, you had an indication that she
7 had rated the defendant to be a 78, right?

8 A Yes.

9 Q And with respect to Dr. Nagler, all you had to review was
10 her report, right?

11 A Yes.

12 Q Okay.

13 And I think on direct you said something about
14 school psychologists, and psychologists that -- that there's
15 user error or that they potentially make errors that have to
16 be addressed by other professionals?

17 A I don't -- I mean, I think that's a true statement. I'm
18 not sure that I testified to that. I think that was in
19 Dr. James' report, that there are studies showing how
20 frequently tests are misadministered and scored.

21 Q All right.

22 And you would agree that school psychologists, or
23 any psychologist, should be afforded the respect to believe
24 that they discharged their duty of giving an IQ test
25 appropriately and that they reported the results accurately,

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1 correct?

2 A I think in most cases, that's quite true; that we don't
3 have the resources to do what's been done in this case and go
4 examining the raw data and interviewing people and so on; that
5 that as a matter of -- in customary practice, we assume that
6 people are doing their job properly.

7 Q You take their results on faith, right, that they're
8 doing their job correctly, right?

9 A Yes. And we would only question it unless, in a case of
10 an Atkins case, the stakes are so high that if you can look
11 further, it's worth examining.

12 Q I think I would like to examine that statement, Doctor.
13 You've made a number of references here to the stakes being so
14 high. What do you mean by that?

15 A I mean that if the finding is that the defendant has an
16 intellectual disability, he cannot be executed.

17 Q So do you view your role in this case as being the
18 arbiter of whether or not the defendant is found to be
19 mentally retarded or not?

20 A No. The judge is that arbiter.

21 Q Well, do you understand your role in this case is to
22 provide an expert opinion that is consistent with the
23 standards of practice, and that's it?

24 A Yes.

25 Q So when you say the stakes are so high, that's actually

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1 irrelevant to what it is that you're testifying about,
2 correct?

3 A I made that comment because in Atkins cases, we have the
4 resources to look more closely; and we do. In an ideal world,
5 that same thoroughness would be applied to other
6 circumstances.

7 Q Doctor, you're testifying as an expert in psychology,
8 correct?

9 A Yes.

10 Q You're applying the standard of practice, correct?

11 A Yes.

12 Q Whether or not this defendant ends up getting executed
13 has no bearing on your opinion; yes or no?

14 A That's -- that's true. I am not here to make that
15 decision or to advocate.

16 Q Well, are you adjusting your science because you feel
17 that the stakes are so high?

18 A No. I'm saying a thorough job is possible because the
19 stakes are high.

20 Q Well, you've said it in other instances during your
21 testimony here today. You've mentioned that this could --
22 that your testimony could have some, you know, serious
23 effects, or the stakes being so high.

24 I'm asking you, are you applying a different
25 standard to this case than you would to a case where somebody

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1 walks into Chapel Hill and says, "Look, I think I'm mentally
2 retarded. Can you tell me if I am"?

3 A No. If I had the resources to do all of the
4 investigation in this case, I would do it in that case as
5 well.

6 Q Okay.

7 Did you read Dr. Nagler's report?

8 A I did sometime ago.

9 Q Okay.

10 In Dr. Nagler's report where she gives him a 71 --
11 we've mentioned this yesterday, and it's already in evidence.
12 I'll just read it to you. The report says, "Earl," the
13 defendant, "squirmed and placed his fingers in his mouth. He
14 yawned continuously. He blurted out responses and generally
15 utilized a careless, impulsive approach during the course of
16 his WISC-III test that turned out 71."

17 Did you read that?

18 A Yes.

19 Q And was that significant to you?

20 A In -- in Dr. Nagler's opinion, if that behavior detracted
21 from his performance so significantly as to invalidate the
22 test, she would have mentioned it in her report that it was an
23 invalid score.

24 Q She -- well, first of all, we'll never know what she
25 meant, right?

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1 A Right.

2 Q All right.

3 We have to -- we have to make an assessment because,
4 unfortunately, Dr. Nagler is unavailable, right?

5 A Yes.

6 Q You would agree that this note here is of some
7 significance, correct?

8 A Yes. She chose to -- to mention it as a description of
9 his behavior during testing, which is a standard thing to do.

10 Q Okay.

11 And she didn't mention it -- or we can only assume
12 that she didn't mention it because she didn't think it was a
13 big deal, right?

14 A I'm sorry. I didn't fully catch that.

15 Q Well, I'll rephrase that.

16 She mentioned it because she believed it was
17 significant, right? That's what you put in the "behavioral
18 observations" notes portion, are the significant things,
19 right?

20 A Yes, significant for whatever purpose.

21 Q Okay.

22 But for you to -- to question her score, you would
23 need more than this note, right?

24 A I believe so. I would love to see what else she wrote to
25 say -- either -- either she would have stopped the

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1 administration, and not continued it, because she felt that it
2 was invalid; or if she didn't make that decision until she was
3 nearly finished, she would have indicated in her report that
4 the test was given, but the score was invalid.

5 Q So that's what you would have needed to invalidate that
6 71? You would have needed a statement from Dr. Nagler on this
7 report, saying, "Don't pay attention to this 71 because I'm
8 invalidating it," right?

9 A That would be convincing certainly.

10 Q Okay.

11 But you rely on this report as being sort of like
12 a -- the touchstone or the main proof that the defendant meets
13 the intellectual-deficit problem, right?

14 A Yes.

15 Q You would agree that this is a pretty strong asterisk
16 being placed on that report, right?

17 A Wechsler IQ tests are pretty -- what they refer to as
18 "robust." In other words, if you get a good score, even in
19 the face of typical childhood fidgetiness and so on -- if what
20 she meant by this was he's a fidgety child, that's one
21 interpretation. If what she meant by this is that it impaired
22 his ability to obtain a valid score, then that would be noted
23 in her report.

24 Q But that's not what it said, right? It's not saying that
25 he's a fidgety child. It's saying that he was -- squirmed, he

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1 placed his fingers in his mouth, he yawned continuously, he
2 blurted out responses, and that he generally utilized a
3 careless manner and impulsive approach.

4 I mean, that's -- that's not what you just said, is
5 it? I mean, that's a little bit more.

6 A It is a little bit more.

7 Q Let me -- let me ask this: We would agree that's an
8 asterisk on this report, right? It's not a total
9 invalidation. It's an asterisk on the report, correct?

10 A I would look to see -- as you mentioned, there's
11 typically a section on behavioral observations. There's
12 typically conclusions that would be the point at which she
13 would note that this test has yielded an invalid score.

14 In other words, you've said it's an asterisk. I
15 would look for the asterisk, coming from her, to say that it
16 was compromised.

17 Q But it is coming from her. She's saying this in her
18 "observations" portion of the report. She's saying, "Here's
19 the way the defendant was when I was giving him this test,"
20 okay? That's what she's saying.

21 A Yes.

22 Q I agree with you: She doesn't write on this report,
23 "Nobody pay attention to this IQ score," right?

24 A Yes.

25 Q And as long as she says, "Nobody pay attention to this,"

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1 you're not going to invalidate it, right? Because it's a 71,
2 right?

3 A Yes.

4 Q Okay. Now, in *Hill* you were asked whether or not you'd
5 honor an asterisk on a report. Do you remember that?

6 A No. But I'll listen.

7 Q Okay. Page 742. "QUESTION: It seems here we have
8 reason to depart from that custom due to her deficits and lack
9 of involvement with school life. Is that fair to say?

10 "ANSWER: The report -- the school psychologist's
11 report indicated that caution -- and I am respectful of that
12 examiner's decision to essentially put an asterisk after the
13 score and say, 'We don't trust it fully.'"

14 MR. BURT: I'm sorry. The last word?

15 MR. McGOVERN: "And we don't trust it fully."

16 MR. BURT: Thank you.

17 BY MR. McGOVERN

18 Q ""QUESTION: As Dr. Darnel, same?

19 "ANSWER: Dr. Schmidt Goessling.

20 "QUESTION: Dr. Darnel did it January 10, '84?

21 "ANSWER: Yes.

22 "QUESTION: Go ahead.

23 "ANSWER: Both of the low scores, the examiners
24 expressed their caution about whether that was an acceptable
25 score. And that's certainly appropriate for the examiner to

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1 indicate. The examiners didn't say, 'Disregard it altogether.
2 This is invalid. Pretend that it didn't exist.' They said,
3 'Look at it closely' -- "'Look at it closely, at this,
4 because it's suspect.'"

5 "QUESTION: Pretty highly suspect, isn't it?

6 "ANSWER: In their view, it was."

7 Do you remember giving that testimony?

8 A I'm -- yes. I don't -- I mean, we'd have to compare the
9 wording in one and the wording in the other.

10 But I understand your point, that we respect those
11 statements that are made by the examiner at the time because
12 that person was there to observe, and I'm not.

13 Q Yeah. And that person was there, and that person put
14 observations that she took the time to write out.

15 And you would agree, I think, that these school
16 psychologists, either be it Dr. Nagler or Dr. Drezner -- they
17 wrote lengthy commentaries about the defendant as part of
18 their evaluations of his IQ, correct?

19 A Yes. Ms. Drezner, who is not Dr. Drezner, wrote some
20 things that I would disagree with. I think they were not
21 based upon the kind of standards that we would say are
22 evidence-based today.

23 Q But she said some really nice things about the defendant,
24 didn't she?

25 A Yes.

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1 Q I mean, these folks appear to be very caring
2 professionals, right?

3 A That was my impression when I met with her.

4 Q Right? Isn't this the -- isn't Ms. Drezner or -- well, I
5 don't know what her -- what her title was.

6 A She's not a doctoral-level person.

7 Q All right.

8 Well, I mean, she -- she said things about him that
9 were remarkably kind and caring, correct?

10 A Yes.

11 Q Stuff like -- it's within the Drezner -- excuse me -- the
12 Nagler report that's already in evidence. "Beneath the boy's
13 gruff facade is a lonely, vulnerable boy hungering for love
14 and acceptance."

15 She wrote that, right?

16 A Yes.

17 Q This doesn't appear to be somebody who is taking their
18 duties lightly, does it?

19 A No. I didn't imply that she takes them lightly, although
20 I disagree with some of her interpretations.

21 Q Sir -- but my question is, these -- these psychologists,
22 the school psychologist, did their ethical best, in your
23 estimation, to get this right, correct?

24 A Yes. I don't believe it's a manner of being unethical to
25 disagree with the findings.

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1 Q Well, they either got it wrong or they lied, right?

2 A No. I don't think those are the only -- well, if they
3 got it -- yes. If she got it wrong, I think she got it wrong.
4 That doesn't mean she didn't have really good intentions about
5 her students.

6 Q And so -- you say "her students." She's the school
7 psychologist. She's not his teacher, right?

8 A Well, she -- she was a teacher, and then she took some
9 courses to get a certification. In those days it was much
10 easier to become a school psychologist without having --
11 actually having a degree in psychology.

12 Q Is this Ms. Drezner or Ms. Nagler?

13 A Ms. Drezner. Ms. Nagler is a -- Dr. Nagler, I believe.

14 Q Yeah.

15 We're talking about Dr. Nagler.

16 A Oh, excuse me. I'm sorry.

17 Q I apologize.

18 Dr. Nagler was the one who prepared the 1994 report?

19 A Yes.

20 Q Okay.

21 When she makes behavioral observations about the way
22 that this defendant at the age of 12 took this test, would you
23 agree that we should honor and respect -- or take, as you
24 said -- honor that asterisk that she put on this test?

25 A Yes, although how we honor it, I don't know, because she

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1 didn't give more information than that.

2 Q Well, Doctor, just in applying common sense, moving out
3 of the area of psychology, every single one of these test
4 scores is essentially the same except for hers, right?

5 A Close to that, yes.

6 Q And every single one of those professionals said that
7 this gentleman's intellectual capacity, or potential, is
8 understated by those scores, correct?

9 A I don't know if it's everyone, but that was a frequent
10 comment, yes.

11 Q Okay.

12 And Nagler, Dr. Nagler, the one that you're relying
13 on as evidence of prong one, tells us from, unfortunately, the
14 grave that he sat there and was careless and blurted out
15 answers and took this test in a careless manner.

16 And that's the one you're asking this Court to rely
17 on?

18 A Yes, unless she elaborated to say that that was an
19 invalid score or that -- even to say that it meant that he
20 could have done better.

21 Q Is this another area that you've learned since the *Hill*
22 case? Right? Because in the *Hill* case, you said unless -- in
23 the *Hill* case, you said you would honor and respect if
24 somebody put an asterisk on a report, right?

25 A I honor her statements. I don't quite know how to

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1 interpret them; but I will defer to your statement that it is
2 there and that the others, other reports, have a more
3 optimistic statement about his potential.

4 Q Okay.

5 Well, you've got four experts -- as you understood,
6 you had four experts who were working on this evaluation,
7 correct?

8 A Yes.

9 Q Nobody gave the defendant an IQ test when you-all got
10 retained, right?

11 A Yes.

12 Q Isn't the WAIS-IV like the gold standard in determining
13 whether or not somebody has an intellectual deficit at this
14 point?

15 A At this point is several years after the time of the
16 crime, and my understanding is that our responsibility is to
17 assess his functioning in the developmental period and around
18 the time of the crime.

19 Q Well, let me restate it.

20 At this point in humanity, that -- in civilization,
21 the WAIS-IV is currently the gold standard for testing
22 somebody's intellectual deficits, correct?

23 A I think either that or the Stanford-Binet are both
24 acceptable.

25 Q And if you gave him the WAIS-IV yourself, or one of your

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1 colleagues, you could come in and testify as to how he did on
2 that test, correct?

3 A How he did on the test at the time that it was
4 administered, yes.

5 Q And you've testified multiple times that IQ should stay
6 the same, right?

7 A Intelligence stays the same; IQ scores can vary.

8 Q But, theoretically, an IQ score should stay the same,
9 much like we're seeing here, much like the 84, the 78, the 80,
10 the 84, the 76, the 80, right?

11 A Well, we're -- we're parsing words here. But I think
12 it's a reasonable distinction that the -- that intelligence is
13 a theoretical trait that we have. IQ scores is our best
14 effort at measuring that, and IQ scores vary.

15 Q And there would've been absolutely no harm, to the Court
16 anyway, for you to have just given the defendant an IQ test,
17 just like anybody -- any other psychologist would have, if
18 they were asked to evaluate the defendant's intellectual
19 deficit?

20 A That could've been done by Dr. James. That was her call,
21 and not mine, because I wasn't asked to work in that area.

22 Q And you didn't tell her to do that, right?

23 A I did not.

24 Q I mean, because if you got another 80, that certainly
25 would have caused even further question of the 71, right?

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1 A It would have, and it has.

2 THE COURT: All right. Let's take a ten-minute
3 break.

4 (Whereupon, a break was taken at 4:41 p.m.)

5 (Time noted: 5:00 p.m.)

6 THE COURT: Be seated, please.

7 (Defendant present in open court.)

8 THE COURT: The defendant is present.

9 Mr. McGovern, how much more do you have for this
10 witness?

11 MR. MCGOVERN: I'll be going through the rest of the
12 session and -- and potentially a little bit more.

13 THE COURT: I'm just asking.

14 MR. MCGOVERN: Okay.

15 THE COURT: We'll go until 7:00, and then we'll
16 resume tomorrow at 9:00 with either your continued cross or
17 redirect, whichever.

18 MR. MCGOVERN: Thank you very much.

19 THE COURT: Okay. Let's proceed, then.

20 BY MR. MCGOVERN

21 Q Good afternoon again, Dr. Olley.

22 THE COURT: I remind the witness that he is still
23 under oath.

24 THE WITNESS: Thank you, sir.

25

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1 BY MR. McGOVERN

2 Q When we left off, Dr. Olley, we were obviously talking
3 quite a bit about Dr. Drezner's 1994 IQ that revealed a score
4 of a 71, right?

5 A Dr. Nagler's.

6 Q Dr. Nagler's. I'm sorry.

7 A I'm sorry -- I'm confused too.

8 Q All right. So Dr. Nagler's score that revealed a 71.

9 I want to switch gears here for a moment and talk to
10 you about an IQ test that was done in January of 2000 by
11 Dr. Popp. Have you seen that one?

12 A Yes.

13 Q Okay.

14 And that was done when the defendant was 17 years
15 old and 8 months, correct?

16 A Yes.

17 Q And according to that score, he achieved a full-scale
18 score of an 84, correct?

19 A Yes.

20 Q And you would agree that -- putting aside Dr. Nagler's
21 score, that 84 is relatively consistent his other scores,
22 correct?

23 A Well, it's certainly on the high end. There's one other
24 84 but that was when he was very young and I would not put a
25 lot of trust in that.

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1 Q Okay.

2 But it's also consistent with the -- with the
3 finding that the defendant's verbal IQ is -- has a discrepancy
4 with his performance IQ, correct?

5 A Yes.

6 Q Okay. By "discrepancy" I think the DSM defines that as
7 about a standard deviation, right, about 15 points?

8 A That's a common way of describing it, yes.

9 Q And Dr. Popp's IQ appears to be a perfectly fine IQ test,
10 right?

11 A I don't recall more about it than what I'm seeing on this
12 slide.

13 Q Well, it's -- it's done when he's just about 18 years
14 old, correct?

15 A Yes.

16 Q I mean, that would be heartland of an evaluation of a
17 person for mental retardation before the age of 18, correct?

18 A Yes.

19 Q It was done in the New York City school system, correct?

20 A Oh, yes, it was.

21 Q Right?

22 It was the first time that he took the WAIS-III, so
23 he probably had limited practice effects, right?

24 A There are some -- there are some practice effects, at
25 least in the judgment of Dr. Kaufman, who is the person that's

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1 written most about this, that continues across all of the
2 Wechsler scales, because of their similarity. And, you know,
3 what I don't -- well, stop me if this isn't --

4 Q Well, it's actually not answering my question, so we can
5 stop there.

6 A Okay. I'll start over again.

7 THE COURT: Excuse me. I believe it is answering
8 his question. He may not like the answer, but I believe it's
9 responsive.

10 MR. McGOVERN: Okay.

11 THE COURT: Well, has it been answered?

12 BY MR. McGOVERN

13 Q Is there something that you would like to add about
14 Dr. Kaufman's take on practice effects and how that they span
15 all of WAIS and WISC testing?

16 A Only that there are similarities across all of the
17 Wechsler scales that could contribute.

18 What I was about to say -- and you can strike that,
19 if you think it's inappropriate.

20 THE COURT: I can strike it if I think it is
21 inappropriate.

22 THE WITNESS: Sorry. I'm aiming at the wrong
23 person.

24 A Or you can challenge me if it's not appropriate.

25 THE COURT: Right. Go ahead.

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1 A There are data of the earlier versions, going from the
2 WISC-R to the WAIS-R where scores artificially jumped up.
3 Now, I don't know if the same thing is true going from the
4 WISC-III to the WAIS-III. So that's why I said -- you know,
5 I'm not giving you a specific reference, so that may not be --
6 that's not something I have firmly researched.

7 Q That's a fair amount of speculation, correct?

8 A Yes. It's based upon the earlier versions of the WISC
9 and the WAIS.

10 Q Yeah.

11 And even if you were to go crazy putting a practice
12 effect decrease on Dr. Popp's score, you would have to bring
13 it down by 14 points to get it to a 70, right?

14 A Yes, if we're just talking about the practice effect.

15 Q And that's what we just talked about, right?

16 A If my other speculation is not true.

17 Q Okay.

18 And Dr. Popp's test was properly administered, as
19 far as you know?

20 A As far as I know.

21 Q So why, then, don't we just stop this hearing and end
22 with the 84 from Dr. Popp that was taken on -- just short of
23 the defendant's 18th birthday and call it on whether or not
24 he's mentally retarded?

25 A Because there's another test that is closer to the time

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1 of the crime that gives a different finding.

2 Q But if he's got an -- if the third prong is that he has
3 to have an onset before the age of 18, I would think -- and
4 you're the expert. Wouldn't the IQ test that is taken just as
5 he's exhausting those 18 years, be the most dispositive of the
6 question?

7 A What is required is that the condition exists before the
8 age of 18. It is not required that a particular kind of test
9 be administered before the age of 18.

10 Q That's fair.

11 However, wouldn't it be very, very strong evidence
12 that he doesn't have mental retardation if he scored an 84 on
13 prong one, or the test for prong one, just before his 18th
14 birthday?

15 A Well, now that we know that there was another test close
16 to the time of the crime that is more -- one that Dr. James
17 relies upon, I don't think it would be reasonable to toss out
18 that information and say, in retrospect, there should've been
19 no more IQ tests after his 18th birthday.

20 Q Are you suggesting to the Court that the test that was
21 taken in 2003 is more reliable for the question of whether or
22 not he was mentally retarded as a clinical matter -- is more
23 reliable -- that that 2003 test is more reliable than
24 Dr. Popp's test?

25 A No. I'm saying it should be kept in the mix because --

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1 you know, why would you toss it out? We now have it, and it's
2 informative.

3 Q Okay. But it's really informative, right? It's an IQ
4 test that was done right before his 18th birthday. The cutoff
5 for the onset of the condition is his 18th birthday. That
6 would make it certainly in the mix with everything.

7 A Yes.

8 Q It would be a very, very, very important piece of the
9 mix, would it not?

10 A I think the value of this slide is that it presents all
11 of the IQ scores and we get to have this conversation about
12 all of them rather than just some.

13 Q And this is actually even further evidence of why you
14 should have done an IQ test when you were brought into this
15 case, right? We could've put your IQ test into the mix too,
16 right?

17 A Or Dr. James' IQ test.

18 Q But that was not done, right?

19 A It was not done.

20 Q Do you know what you did in the *Hill* case, when you got
21 brought into the case, about IQ testing?

22 A Yes.

23 Q Okay. Do you remember that in the *Hill* case -- where the
24 defendant, much like this defendant, had been in jail since
25 the age of 19, in 1985 -- you showed up, I don't know, almost

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1 20 years later, and the first thing that you and your fellow
2 experts did was give him an IQ test? Do you remember that?

3 A I remember the circumstances of it as well, which were
4 unusual --

5 Q But whether or not they're unusual --

6 MR. BURT: Excuse me. I don't think he's finished.

7 THE COURT: You can finish.

8 A The IQ test was done because the judge gave what, I
9 thought, was an interesting, and perhaps very worthwhile,
10 instruction to the -- there were three experts involved in
11 that case and -- one for the state, one for the defense, and
12 one for the Court. And we were instructed to come to some
13 agreement about what that evaluation would look like and to do
14 that evaluation jointly, and so that was a compromised
15 decision among all three experts to do one IQ test.

16 BY MR. McGOVERN

17 Q Okay. And you agreed with that, right?

18 A I did.

19 Q Okay.

20 And so you agreed that in a case that is much like
21 the defendant's case, where he has been incarcerated for most
22 of his adult life, that the first thing that you did, when
23 this gentleman was in his mid-30's, to assess whether or not
24 he was mentally retarded, was give him a Wechsler WAIS-III
25 test, right?

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1 A The judge in that case required us to render an opinion
2 about his current functioning, which is a different set of
3 marching orders than in our current situation.

4 Q Is that entirely correct, Dr. Olley? Isn't it true that
5 in that case you testified that Mr. Hill was mentally retarded
6 currently, which would've been 2004, but also testified that
7 he was not mentally retarded at the time of the crime in 1985?

8 Am I right --

9 A Yes.

10 Q Or am I wrong?

11 A Yes.

12 Q Okay.

13 So when you testified in the *Hill* case, you opined
14 in little Trumbull County, much like you're doing here today,
15 that the defendant was not mentally retarded at the time of
16 the crime, correct?

17 MR. BURT: Excuse me. Much like you're doing here
18 today?

19 MR. MCGOVERN: Well, sitting in a witness chair.

20 THE COURT: Yeah, it's confusing.

21 MR. MCGOVERN: I apologize.

22 THE COURT: I agree. Restate the question, please.

23

24 (Continued on the next page.)

25

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1 THE COURT: Restate the question.

2 CONTINUED CROSS-EXAMINATION

3 BY MR. McGOVERN:

4 Q In the Hill case, you testified that the defendant was
5 not mentally retarded, correct?

6 A Yes.

7 Q You testified that he was not mentally retarded at the
8 time of the crime or at the time -- or excuse me, not or, and
9 at the time that you appeared at the hearing, correct?

10 A Yes.

11 Q So when that determination was being made or those
12 evaluations on Hill were being conducted, one of the first
13 things that you and your colleagues did was administer a
14 WAIS-III test to Mr. Hill, correct or incorrect?

15 A Correct.

16 Q All right. And as an aside, you did not apply the Flynn
17 Effect to that WAIS-III, did you?

18 A No.

19 Q Because the Flynn Effect in that case would have brought
20 down his score. He posted a 58, correct?

21 A Yes.

22 Q And the Flynn Effect, because it was 2004, it would have
23 brought down his score a couple of points, because you normed
24 the WAIS-III in 1997, right?

25 A Yes.

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1 Q But in this case with this defendant, you and your
2 colleagues and/or I'll just say Dr. James decided not to do a
3 WAIS-IV IQ test on this defendant, correct?

4 A Yes. May I comment further on the Danny Hill situation?

5 Q You'll have time for that on re-direct. We are trying to
6 get through this.

7 Do you know why you're not crediting Dr. Popp?

8 A I really don't recall, because it's been awhile since
9 I've read each of these reports, so fill me in.

10 Q You have no good reason as you sit here to say that
11 Dr. Popp's score is in any way invalid, correct?

12 A I don't, based upon what I recall about his
13 administration.

14 Q Has the defense team informed you how they're knocking
15 down that 84?

16 A I believe so, but I don't recall. This was back when I
17 was writing the report and I was, as I said, relying upon
18 Dr. James' interpretation.

19 Q Well, assuming the ethics and professionalism that you
20 afford other psychologists, you as you sit here, have no
21 reason to question it, right?

22 A Not that I can recall.

23 Q What if I told you that Dr. Popp prorated that score,
24 that he prorated some of the subtests in got him that score,
25 would that be a big problem for you?

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1 A It would certainly be something to bear in mind.

2 Q And is that a reason to invalidate a standard IQ test
3 like that WAIS-III that was given in 2000?

4 A If he gave fewer than all of the subtests, it would be.
5 And again, there are circumstances when prorating is
6 appropriate, but I don't know that I would toss it out, but
7 that would be something to bear in mind.

8 Q Okay. So prorating, you don't have a problem, there are
9 circumstances where it's fine, correct?

10 A I do have a problem with it, and it's typically done for
11 screening purposes or for when the standard administrations
12 are -- have been invalidated for some reason.

13 Q But I just want to be clear so the record is clear, as
14 you sit here today, Dr. Popp's 84 in January 2000, the
15 defendant was just shy of 18 years, as far as you're
16 concerned, is a valid score?

17 A Well, now that you reminded me that it was prorated, then
18 I would revise that statement to say that I would have concern
19 about it.

20 Q Oh, so you're concerned about Dr. Popp now because of the
21 prorating?

22 A I would want to bear that in mind when looking at all of
23 this.

24 Q What about if I told you that Dr. Nagler actually
25 prorated her score, too?

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1 A Then I would want to bear that in mind as well.

2 Q That would be a big problem, wouldn't it be, for

3 Dr. Nagler's score?

4 A It's your words "big problem." I want to look at each of
5 those. And as I said now, had I known that I was going to be
6 cross-examined on the IQ scores rather than the adaptive
7 behavior, I would have refreshed my memory on all of these
8 things.

9 Q You told us on direct examination that you were very
10 troubled by the way that Dr. Drezner did her IQ of the
11 defendant, correct?

12 A If I used "very troubled" then you may have it in front
13 of you, I don't know that I would say it that strongly. I
14 said there were some things that she revealed to me that would
15 make me cautious about her score.

16 Q And that was that she encouraged the defendant in the
17 course of the test, right?

18 A Yes. And that she gave -- she substituted one of the
19 subtests for a reason that appeared to be more to make the
20 test easier for the testee.

21 Q Did she say "easier" or "more interesting"?

22 A She said kids generally like it better and it's easier to
23 administer.

24 Q So it doesn't make it easier, it's just more attractive
25 to children, correct?

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1 A Yes. I can't tell whether it was easier for this
2 individual or not.

3 Q And you find both of these things to be problematic,
4 correct?

5 A More things to be examined in the context of all the
6 other things we've been discussing.

7 Q So when you were administering your test of Danny Hill in
8 2004, you encouraged him too, didn't you?

9 A Actually, I was not the one who did the testing. I was
10 present, one of the other experts was the one that did the
11 actual testing.

12 Q You did administer tests during your meeting with
13 Mr. Hill; is that right?

14 A I did administer some things, I don't recall which ones,
15 but I do recall that I did not administer the IQ test.

16 Q On page 616 of the transcript, it is a long answer but
17 I'll just start with the point you are going to get into --

18 THE COURT: This is which transcript?

19 MR. MCGOVERN: The Hill transcript.

20 Q At 616 in your answer you say, "At that point Mr. Hill
21 became very upset, put his head down and started crying. And
22 I think I had -- I would have to consult my report for the
23 better estimate of what was said, I believe he said 'this
24 stuff is hard.' And then when I encouraged him to go on, he
25 said, 'my head won't work no more.'"

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1 MR. BURT: Your Honor, might I be given a copy of
2 whatever is being referenced here so I can keep up on it? I
3 don't have a copy of this.

4 MR. McGOVERN: You don't have a copy of this?

5 MR. BURT: I don't.

6 MR. McGOVERN: Well, we'll provide a copy and I can
7 -- I don't know if I have one here.

8 BY MR. McGOVERN:

9 Q But in the meantime, Doctor, does that sound familiar?

10 A Yes, that was with the administration, not of an IQ test,
11 but of an academic achievement test. And at that point he was
12 ready to give up and stop, and I wanted to make sure that he
13 had given his reasonable effort too, and I think that's a
14 different matter than an IQ test.

15 Q You encouraged him, did you not?

16 A I did.

17 Q And he was taking a standardized test, correct?

18 A Yes.

19 Q And there's nothing wrong with encouraging somebody to
20 try and finish the test, correct?

21 A I think it's a different matter for an educational
22 achievement test. This was, you know, math skills and so on,
23 and he was discouraged because it was hard for him, and I
24 wanted him to continue to make an effort so I could tell if he
25 could really do these things or if he was just giving up

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1 because he was discouraged.

2 Q And would Dr. Drezner, in her report, actually in your
3 report, you said that her encouragement was inappropriate in
4 some way, correct?

5 A I said it had potential to increase his performance.

6 Q But you acknowledge now, whether it's a different matter
7 or not, that in the Hill case you actually provided
8 encouragement to somebody that was giving up on a
9 psychological test and encouraged them to carry it out, right?

10 A A different kind of test, but yes.

11 Q And then in the Hill case you also -- you gave a more
12 interesting test to do as well; is that right? Do you recall
13 that?

14 A I don't recall what other things I did.

15 Q Page 617. Question: 9:00, 10:00, what time? Answer:
16 Between 9 and 10:00. Question: Okay. Answer: So Mr. Hill
17 continued to weep for five to ten minutes. And I concluded at
18 that time that he wasn't going to get back to this particular
19 task with his best effort, so we shifted gears in order to do
20 some other things that we thought might get him interested
21 again."

22 Does that sound right?

23 A Yes.

24 Q And is that exactly what Ms. Drezner was doing, she was
25 giving alternative tests that would get him -- get the

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1 defendant interested or keep the interest level of the student
2 up?

3 A He had not, as far as I know, in Ms. Drezner's test, not
4 refused to participate. And I don't recall, you may have
5 information about what the other test was, if it was
6 presumably something that I was planning to administer anyway,
7 then shifting gears to try to -- okay, he's not doing this
8 one, let's do this other one that we're planning to do anyway,
9 it seems like a reasonable plan.

10 Q But you agree that you gave Mr. Hill a test that you
11 thought would be more interesting for him at that time; yes or
12 no?

13 A If I could get him to engage more instead of going back
14 to the Judge to say we couldn't do it; then yes, that's fine.

15 Q And the tests that were replaced by Ms. Drezner in place
16 of a less interesting test, it tested essentially the same
17 types of intellectual capabilities, right?

18 A It was an alternative on the performance scale, so it was
19 a different kind of a -- it was mazes, which it's just what
20 the title indicates, it's being able to take a pencil and make
21 your way through a maze.

22 Q But the other test was object assembly, right, which is
23 taking a bunch of items and building it into something,
24 correct?

25 A No, it's putting puzzles together, which it takes longer.

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1 Q Would you agree that they're both visual spacial tests?

2 A Yes.

3 Q I guess the point here, Doctor, would you agree that if
4 you wanted to, you could go back to any IQ test that was given
5 to anybody over time and nitpick, right?

6 A If by nitpick means -- well, let me rephrase it. I think
7 you can -- you could probably find fault in many things.

8 Q And that's why you've testified that you afford school
9 psychologists or psychologists the respect that they're doing
10 their jobs correctly to the best of their ability, right?

11 A Yes.

12 Q And it's not a useful practice to go back and take these,
13 all of these tests apart to try and find some flaw in them,
14 it's -- is that right?

15 A Well, using your term "nitpick" that implies that the
16 thing that you would find is inconsequential, in which case I
17 would certainly agree with you if you found substantial
18 scoring errors or something that was administered
19 inappropriately, then it's valuable.

20 Q Well, in the Hill case at 755 when you were questioned
21 about testing and these matters, the question was: So had you
22 seen, you would have been able to sit here and tell us if you
23 detected any obvious flaws in any of these reports, right?
24 And your answer was: I think that I testified that if we
25 wanted to find imperfections in reports, we probably could

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1 find something in most of the historical records, but that
2 taking it as a whole, I think it would be foolish to take
3 something that looks obvious and try to nitpick it to death,
4 so I'm trying not to do that."

5 Do you recall giving that testimony?

6 A Yes.

7 Q Have you reviewed your notes of Dr. Drezner's interview?

8 A Yes. Not today, but I have.

9 Q During your testimony you said that Dr. Drezner told you
10 that it was a routine practice at her school P9 to say that
11 everybody there had higher intellectual potential than their
12 IQ scores were reported?

13 A I'm not sure to say higher IQ scores, but whatever that
14 phrase was that was in her report, she said, I thought I put
15 that in all the reports.

16 Q Okay. I think in her -- in your notes of that interview
17 she said something to the effect, and your handwriting may
18 limit my ability to read this, "All P9 reports said some
19 conclusion about scores depressed by upbringing."

20 Does that sound a little more about what she said?

21 A If that's what my notes say, sure.

22 Q And that's a factor that would be important to know if
23 you were in a school that was dealing with a group of people
24 who had a certain level of cultural or socioeconomic
25 depravation; is that right?

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1 A No. I think that that violates the standard that we were
2 talking about earlier of altering scores on the basis of
3 socioeconomic status.

4 Q But with all due respect, Doctor, nobody altered any
5 scores, right?

6 A Right.

7 Q Right. Apparently Dr. James is the only one who is
8 altering scores for this defendant. These women or these
9 professions wrote down what the score was and didn't alter it,
10 right?

11 MR. BURT: Objection, he's got a statement an
12 insertion there, not a question.

13 THE COURT: Sustained.

14 MR. BURT: Thank you.

15 Q You read these reports, correct?

16 A Yes.

17 Q You're testifying that this defendant meets prong one,
18 correct?

19 A Yes.

20 Q In those reports you have no indication that the
21 administrators of these reports altered the numbers, right?

22 A Yes.

23 Q So when you say that people are violating, which is a
24 pretty heavy allegation, violating some rule about altering
25 scores based on cultural deprivation, socioeconomic matters,

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1 they weren't doing that, were they?

2 A They were encouraging that that factor, if not literally
3 altering scores, be viewed as something that had artificially
4 suppressed the score. I think the question is, is there a
5 scientific basis for how scores are interpreted? And you can
6 argue that about Dr. James' interpretation of scores for any
7 of these individuals, did she have a scientific basis for the
8 conclusions that she drew and she can answer that better than
9 I can.

10 Q But she didn't alter the scores, that's all I'm saying?

11 A Mr. Drezner didn't alter.

12 Q Drezner didn't alter the scores?

13 A Ms. Drezner did not alter the score. She had a standard
14 statement indicating that scores had been, as I interpreted,
15 artificially depressed because of socioeconomic factors.

16 Q And that doesn't violate any rule, does it?

17 A It doesn't violate a rule to say it, but if it's -- I
18 think it is a misleading statement.

19 Q Well, that's an application of her clinical judgement,
20 isn't it?

21 A Yes. And it endangers the responsibility of taking away
22 from what could be an actual disability by writing it off to a
23 socioeconomic factor.

24 Q But she's just noting it in her reports. You said
25 something during your direct to the effect that they put these

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1 notes in there to make the children feel good, to make people
2 feel good, right? Do you remember saying that?

3 A Yes.

4 Q Who's feeling good with this report by Ms. Drezner? Did
5 you have any indication that this was given to the defendant
6 for him to try and read it?

7 A The feeling good has to do with the encouraging
8 statements that she made, so I apologize if I gave a confusing
9 response to that.

10 Q By the way in your report -- you went further, and I have
11 to deal with this because the report was offered in evidence,
12 in the report you went further and you invalidated
13 Ms. Drezner's findings in the IQ test by saying she went over
14 the top with the encouragement saying, "that's a good answer",
15 "I like that one." Do you recall that?

16 A I don't believe I used over the top, but words to that
17 effect.

18 Q You understand that she disputes having said that?

19 A Yes.

20 Q And your notes have some mention of that statement in
21 there; however, there is no indication that such a statement
22 was made to this defendant, right?

23 A Right.

24 Q And there is further no indication in your notes that
25 that statement was made or a statement like that was made

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1 during the course of IQ testing, right?

2 A To the extent that she said it was a standard thing to
3 say, then I would assume that it was said to this defendant.

4 Q That's an assumption, correct?

5 A I think that's a reasonable assumption.

6 Q Doctor, I'm going to move to a new area.

7 You've spoken during your examination as it relates
8 to IQ about the Flynn Effect. Do you recall that?

9 A Yes.

10 Q And the Flynn Effect is essentially a theory promulgated
11 by Dr. Flynn in New Zealand that says that the general
12 population of the United States gets smarter at 0.3 points per
13 year, IQ points per year; and therefore, we should decrease IQ
14 scores by the amount of years times 0.3 for the time that the
15 test was normed or the difference between the time the test
16 was normed and the time the test was taken. Does that sound
17 right?

18 A That's a summary, but that's a very lengthy one. So to
19 use your words, I might have to deconstruct it a bit.
20 Dr. Flynn has an academic appointment in New Zealand, he's
21 actually from the United States, and the data you are
22 referring to are from the United States.

23 Whether he advo -- well, two points. One, is this a
24 scientifically valid finding? You refer to it as a theory,
25 and of course theory has a certain meaning in science. The

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1 way you phrased it makes it sound like it's trivializing it,
2 and I think it is a valid and well-substantiated scientific
3 finding. And the one issue is the validity of its findings.

4 And the second issue is what do you do with that
5 information in an Atkins hearing. So Dr. Flynn, as you
6 indicated, has advocated and many other people have advocated
7 that a more accurate estimate of current IQ could be obtained
8 by taking the Flynn Effect into account in the way you
9 described.

10 Q And that being the 0.3 per year for each year that passes
11 after the test was normed, right?

12 A Yes. And that 0.3 was arrived at by many studies and not
13 all of them are exactly 0.3, that's an average of many
14 studies.

15 Q And you've never used the Flynn Effect in your -- you've
16 never been in private practice, but in your clinical practice
17 you've never used the Flynn Effect, right?

18 A I have not. I have not done that for several years, so
19 the Flynn Effect has become much more front and center in the
20 scientific community as a result of that Davis hearing.

21 Q In the Davis case you testified that Flynn was not used
22 as far as you understood in a clinical setting, correct?

23 A I think it was not customary at that time to use it.

24 Q So in 2009 it's been more customary for people in the
25 clinical setting to employ the Flynn Effect, right?

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1 A Well, it's hard to say, because it's mostly written about
2 in the context of the Atkins hearings. Dr. Flynn has written
3 about it in other contexts and urge that it be taken into
4 consideration, I don't have any data on how widely that's been
5 done.

6 Q And you haven't been in a clinical setting for more than
7 five years, right?

8 A Right.

9 Q So your representation that it's becoming more prevalent
10 in the clinical setting isn't based on too much data, right?

11 A Well, it's only based on it's being written about in more
12 context besides Atkins, so one of the criticisms of it years
13 ago was it wasn't done in clinical settings because people
14 didn't know about it. I think people know about it more now,
15 so I'm hoping that it is at least taken into consideration.

16 Q You're hoping that the Flynn Effect gets more
17 consideration?

18 A Yes, in a setting, because I think it is a valid
19 scientific finding.

20 Q You know, Dr. Flynn, as of his very important article,
21 "Tethering the Elephant," do you know that?

22 A Yeah.

23 Q He actually said in that article at page 174 that he took
24 some issue with what a California court said when he cited
25 "People versus Superior Court in California. It goes further

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1 than I would in asserting that the Flynn Effect seems to be
2 generally accepted in the clinical field."

3 Did you read that in Dr. Flynn's article?

4 A Yes, and also his 2012 book I think does advocate for
5 much broader application of that.

6 Q So he's advocating for a broader application of the
7 autonomous rule that he has created, correct?

8 A Yes.

9 Q And he testifies regularly, does he not?

10 A He does.

11 Q Just like yourself, right?

12 A Yes.

13 Q He's all over the United States testifying in Atkins
14 hearings, correct?

15 A That, I don't know. He lives in New Zealand and comes
16 back and forth, so how much and where he testifies, I really
17 don't know.

18 Q Okay. But he's certainly advocating for the use of Flynn
19 Effect in a more clinically based setting, correct?

20 A Yes.

21 Q But I think we can agree that even in the vast amount of
22 time that's passed since the Davis case, that the standard of
23 practice in the clinical setting is not to apply the Flynn
24 Effect, correct?

25 A I think we just discussed this and the answer is I don't

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1 know.

2 Q Okay. So that's a perfectly fine answer. Are you
3 familiar with an article that was written by an Eric Drogin?

4 A Can you tell me more.

5 Q Adjusting IQ scores for the Flynn Effect consistent with
6 standard of practice question mark?

7 A Yes, there are other authors of that as well, are there
8 not?

9 Q Leigh Hagan.

10 A Yes.

11 Q From the Virginia Commonwealth University. I think he's
12 a board certified psychologist?

13 A Yes.

14 Q And Thom Guilmette from Providence College and Eric
15 Drogin from Harvard Medical School, you're familiar with that
16 article?

17 A Yes, I am.

18 Q This is one of the articles that you reviewed and
19 considered in formulating your opinions in this case and a
20 multitude of other cases you've been involved in, right?

21 A Yes.

22 Q What these psychology professionals set out to do was to
23 take a broad-based survey of people who were actually involved
24 in the clinical field and determine whether or not that Flynn
25 Effect is something that is being utilized in practice, right?

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1 A Yes.

2 Q All right. And without jumping too far ahead, their
3 conclusion was that the Flynn Effect actually does not
4 represent the standard of practice in the United States,
5 right?

6 A That was their conclusion in 2008 or whenever it was when
7 they did the survey.

8 Q And the survey involved interviewing and surveying
9 doctoral program directors, right?

10 A Yes.

11 Q And diplomates of school psychologists?

12 A Yes.

13 Q And by diplomat, that's a board certified folks, right?

14 A Yes, essentially it is.

15 Q Board certified has a meaning in your profession, does it
16 not?

17 A Yes.

18 Q It means that you've had to submit to judgment of your
19 expertise as to whether your practice is consistent with these
20 standard of practice for your individual discipline; is that
21 right?

22 A Yes.

23 Q And are you board certified?

24 A There is no such thing as board certification in
25 developmental disabilities.

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1 Q I don't mean any harm, but these other folks here that I
2 talked about, at the very least, Leigh Hagan is a board
3 certified psychologist, right?

4 A Yes.

5 Q And they -- beyond just speaking to the people who ran
6 doctoral programs in this country and beyond speaking to board
7 certified school psychologists or people who are board
8 certified in school psychology, they actually reviewed the
9 testing instruments and the protocols, and determined from
10 those documents and materials that the Flynn Effect was not
11 recognized as a valid reason to alter an IQ score; is that
12 right?

13 A May I comment on that?

14 Q Sure.

15 A Leigh Hagan is the primary person who testifies in
16 Virginia for the prosecution in Atkins cases, so just to put
17 that on the record.

18 Q Who does Mr. Flynn testify for? I bet he doesn't do much
19 for the government, does he?

20 A I'm just --

21 Q You're just saying.

22 A I'm just mentioning that for you.

23 Q I know.

24 A That article and a rejoinder that they wrote to an
25 article critical of that by Tesse and Cunningham, plus a

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1 letter to the editor in the Division 33 Publication are the
2 only published articles that I know of that take that
3 position.

4 There was a presentation at the American
5 Psychological Association last -- was it last year or the year
6 before last that reviewed over 100 articles on the Flynn
7 Effect, and it was very few -- these ones that you mentioned
8 are the only ones that advocated against the application of
9 the Flynn Effect.

10 I'm not sure that's a really valid scorekeeping, but
11 you pull out this one article and I just want to make it known
12 that it's not the only point of view, and I believe it's a
13 minority point of view of people writing in this area.

14 Q Doctor, during your direct examination there were
15 articles mentioned on a multiple of occasions standing for
16 different propositions that you were representing in this
17 courtroom, right?

18 A Yes.

19 Q Is it fair to say that there may be other positions and
20 other articles that run contrary to the views you've been
21 espousing here today?

22 A I think if you are referring to articles having to do
23 with standards of practice, in Atkins cases particularly,
24 those things cited in the AAIDD manual, I think you'd be hard
25 pressed to find articles that say no, you shouldn't take the

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1 practice effects into consideration or no, you shouldn't use
2 confidence intervals or a variety of other things.

3 I do think well, it's not some people say this and
4 some people say that. What I want to represent here is a
5 standard that's well accepted throughout our field, and I
6 don't want to cast it as Greg Olley thinks it's this way and
7 there are other opinions, so they're all equal. I think I'm
8 doing my best to represent what I think is, as you said, good
9 practice.

10 Q Okay. The problem with what you just said is that I
11 don't -- this article that I just presented or discussed with
12 you is only answering the question whether or not the Flynn
13 Effect is consistent with standard practice, not with whether
14 or not it should be used in Atkins cases or anywhere else.
15 The answer to the question is, it's not being used in standard
16 clinical practice, and you don't appear to disagree with that,
17 do you?

18 A At the time of that survey and for the people who
19 responded to it, that's a valid finding.

20 Q Well, and ten minutes ago or five minutes ago you told me
21 you have no reason to believe that your statements in the
22 Davis case where you said that the Flynn Effect is not used in
23 clinical practice, you have no reason to believe that is valid
24 or reason to believe that that has changed?

25 A I don't know that that has changed in clinical practice,

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1 which is of course a different setting than Atkins cases.

2 THE COURT: Excuse me, could you just identify the
3 date and the publication which that was found on the record?

4 MR. MCGOVERN: The article is "Adjusting IQ Scores
5 for the Flynn Effect Consistent With the Standard of
6 Practice." It is in the professional -- it's in the
7 Professional Psychology Research and Practice, 2008, volume
8 39, number six. 619 through 625, and I will provide the Court
9 with a copy of it.

10 THE COURT: Well, I think that would require to all
11 these applications. I think it's important with the
12 possibility, first of all, for the Court and also the
13 possibility for appellate review that a copy be made part of
14 the record. It does not mean that that validates the
15 statements or invalidates statements, but I do think that
16 since we're going into such technical detail in this hearing,
17 that we have the actual documents as part of the record. Is
18 there an objection to that?

19 MR. BURT: None whatsoever. I agree.

20 THE COURT: So at the end of the hearing you can put
21 it altogether, give it numbers and we'll make it part of the
22 record.

23 MR. BURT: Thank you.

24 THE COURT: Thank you very much. Go on.

25 BY MR. MCGOVERN:

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1 Q So, Doctor, moving away from articles that offer opposing
2 views to other articles that you've read that advocate for the
3 Flynn Effect, I want to follow-up on something you said again,
4 which is that this is becoming -- the Flynn Effect is becoming
5 the standard in Atkins cases, right?

6 A I think it's moving in that direction from the
7 information that I know.

8 Q Okay. Is there a discipline in medicine called Atkins
9 cases?

10 A No, sir.

11 Q Bear with me, I'm not a medical professional. I'm asking
12 you questions about what the standard of care is as a
13 psychologist, as a developmental disability specialist, and on
14 occasion you're giving me answers about what the standard of
15 care is in Atkins cases.

16 Are you perceiving some difference here that says
17 death penalty litigation in the forensic context has one set
18 of rules and everybody else who's practicing psychology,
19 licensed, board certified, whatever have a different set of
20 rules? If that's the case, just tell me.

21 A No. What I'm saying, and I think it's very important, is
22 that Atkins cases have forced our profession to look carefully
23 at some things and articulate some things that are important
24 to bring to the court, in order to have the most valid
25 information for the court to make its decisions, and that's a

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1 good thing.

2 It means that the field changes by looking at
3 something like the Flynn Effect, which I believe prior to the
4 attention that it's gotten, because of Atkins cases was
5 regarded as a valid but somewhat obscure psychometric finding,
6 now we look more closely at the Flynn Effect and we look at
7 other factors that could influence why IQ scores such as these
8 vary over time. They look -- they have forced us to look more
9 carefully at things such as the retrospective administration
10 of scales of adaptive behavior. I mean, these are good things
11 in the sense that it pushes our field to look at questions
12 that we might not have looked at so closely in the past.

13 I don't think it's an -- to answer your question, I
14 don't think it's a different standard of practice, I think
15 it's helping us to clarify our standard of practice.

16 Q So despite the fact that you don't know of any evidence
17 of anybody actually using the Flynn Effect in clinical
18 practice, you believe that it's still part of standard of
19 practice; yes or no?

20 A No, I didn't say that. I'm saying I don't know, because
21 I guess if Dr. Hagan does another survey and maybe surveys a
22 broader sample of psychologists, he might get another
23 response. But as you point out, there is a distinction
24 between does everybody do it versus is it valid. And what you
25 are arguing is you want me to say it's not commonly done, and

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1 that's Dr. Hagan's argument as well, but it can still be valid
2 even though it's not widely done.

3 Q Well, you know that the publishers of the WAIS test say
4 that it shouldn't be done, right?

5 A Yes, I was going to mention that earlier. They have a
6 considerable financial stake in their product.

7 Q Well --

8 A You don't really expect them to say well, we spent all of
9 this money to develop the test, but it's gradually becoming --
10 the norms are gradually become invalid.

11 Q So you acknowledge that the people who make the Wechsler
12 test the gold standard of IQ testing in this country, that
13 they do not recognize the Flynn Effect, right?

14 A Oh, I think they do recognize it. I mean, the mere fact
15 that they have to keep re-norming their test is a passive
16 admission that the Flynn Effect exists.

17 The question as I understood it was should one take
18 that into consideration in interpreting individual scores.

19 Q Doctor, the folks at Wechsler Adult Intelligence or
20 whatever it is psychology or Pearson --

21 A Pearson.

22 Q -- they wrote a direct response to Dr. Flynn's Tethering
23 the Elephant article and said, don't reduce IQ scores based on
24 this theory, right?

25 A Yes.

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1 Q All right. And you've seen their statements, have you
2 not?

3 A I haven't looked at it recently, but I have seen it, yes.

4 Q Their statement said adjusting data to fit theory is an
5 inappropriate scientific method regardless of how well the
6 theory may have been in previous studies. You've heard them
7 -- you remember that?

8 A That's their view.

9 Q Do you remember their view being still there is no
10 scientific justification for adjusting data to fit theory as
11 the publisher of Wechsler series of tests, Pearson Education
12 does not endorse the recommendation made by Flynn to adjust
13 WAIS-III scores. Do you remember reading that?

14 A Yes.

15 THE COURT: When was that?

16 MR. McGOVERN: That was in 2008, and that was a
17 document that I'll provide to the Court, it was a WAIS
18 technical report.

19 THE COURT: Has the defense seen that document?

20 MR. McGOVERN: I have copies of it.

21 THE COURT: I think everybody should have the same
22 information. The witness is familiar with it, but I think
23 it's important for everyone to have it.

24 MR. McGOVERN: I'm sure Mr. Burt has seen that.

25 THE COURT: Let's give it an exhibit number.

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1 MR. McGOVERN: We're going to mark it 65.

2 THE COURT: 65.

3 MR. McGOVERN: And offer it, your Honor.

4 THE COURT: Any objection?

5 MR. BURT: No objection.

6 THE COURT: All right. Government Exhibit 65 is
7 received in evidence without objection.

8 (Government's Exhibit 65 received in evidence.)

9 BY MR. McGOVERN:

10 Q And so you're familiar with the statement by Lawrence
11 Weiss ever Pearson, correct?

12 A Is he the author of the statement you just referenced?

13 Q Yes.

14 A Yes.

15 Q Okay. And basically the statement was there is no
16 scientific justification to adjust data to fit theory, right?

17 A That was -- yes, that's the basis of that statement.

18 Q I suspect you disagree with that, right?

19 A In this area I am very influenced by all the people who
20 weighed in on it and who might weigh in on what I believe is
21 an objective fashion. And I think there are others -- there
22 are certainly others who also are very knowledgeable about the
23 psychometric basis of tests and they don't have a financial
24 stake in the outcome who would agree that it's valid to alter
25 scores or reinterpret scores in light of the Flynn Effect.

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1 Q All right. But your testimony here is we should apply
2 the Flynn Effect in this case, right?

3 A Yes.

4 Q So you disagree with what the makers of the test have
5 said about the Flynn Effect, right?

6 A Yes.

7 Q And that was -- I don't want to oversimplify it,
8 adjusting data, that means scores to fit theory is not
9 appropriate, right?

10 A That's what they said.

11 Q Okay. And you've actually written about this concept
12 before. You have a chapter, chapter 20 that I think you're
13 relatively proud of in the Assessment of Adaptive Behavior
14 Manual?

15 A Yes.

16 Q That's the book that I believe was written by Mr. Oakland
17 or Dr. Oakland?

18 A Yes.

19 Q The person who you spoke about before?

20 A Yes.

21 Q And that chapter is all about assessing adoptive
22 functioning, right?

23 A Yes.

24 Q And in the -- and by the way this is -- the name of the
25 article chapter is "Assessment of Adaptive Behavior in Adult

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1 Forensic Cases: The use of adaptive behavior acceptance two,"
2 that's the ABAS that we were talking about before, right?

3 A Yes.

4 Q And it's authored by Greg Olley and Cox, right?

5 A Yes.

6 Q And you talk about in that chapter about the same concept
7 that Dr. Weise talks about in his rejection of the Flynn
8 Effect. If I can, at page 395 of your article under the
9 heading of clinical judgement you write, "However, alteration
10 of scores without scientific basis is not acceptable practice.
11 Adjustments and that raise or lower scores to make them fit
12 one's clinical judgement or to count for possible influences
13 e.g. poverty, lack of experience with test taking, limiting
14 the test taking opportunities are improper and should not be
15 used."

16 Is that a fair reading of what you wrote in your
17 article?

18 A Yes.

19 Q And what you're saying there is while there may be valid
20 theories for the adjustment or the assessment by the clinician
21 about the value of an individual IQ score, the data itself
22 should not be adjusted; is that right?

23 A I don't think that was my intention. My intention was
24 that any interpretation on the case score should be done in
25 light of scientifically validated findings is not the position

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1 about the effects of those factors that you noted.

2 Q Okay. So specifically the factors that you're talking
3 about in your article that you wrote in 2008, you're talking
4 about factors that have been scientifically recognized that
5 would depress somebody's IQ score, right?

6 A I'm not sure that I follow.

7 Q Well, in your article, the examples that would tend to
8 depress somebody's IQ score would be poverty, lack of
9 experience with test taking or limited educational
10 opportunities. Those would all be factors that could
11 potentially decrease one's IQ score, right?

12 A Well, I think this is the context of talking about
13 adaptive behavior scores and yes, those factors could reduce
14 one's performance and that performance is what we're concerned
15 about when assessing adaptive functioning.

16 Q And yet, you do not want IQ scores to be adjusted upward
17 based on such factors, right, you think that that's wrong?

18 A I think that it's -- it's a matter of what factors can be
19 scientifically validated and then taking them into account
20 appropriately.

21 Q It sounds like you agree to a certain extent with what
22 Wechsler is saying about the application of the Flynn Effect
23 to bring down scores, am I wrong?

24 A I'm not sure that I follow your question. I don't agree
25 with Pearson with --

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1 Q What you just said is that you don't think that it's good
2 to start adjusting IQ scores up based on theories and factors,
3 correct?

4 A On things that cannot be scientifically validated, yes.

5 Q And that is similar to what Dr. Weiss over at Pearson is
6 saying about the Flynn Effect, which adjusts data downward
7 based on scientific theory. Am I right or am I wrong?

8 A Yes, I see your analogy.

9 Q Okay. Because you do recognize that are there biases in
10 the test, right?

11 A What do you have in mind?

12 Q Well, you agree that these tests have a bias against
13 African Americans, right?

14 A No. African Americans are represented in standardization
15 sample of the Wechsler scales, for example. In the -- to the
16 portion that they exist in the United States population. So
17 they're being compared to everyone in the United States
18 population, which includes people who are African American
19 race.

20 Q We'll go back to Hill again at page 545. Question: And
21 I believe in court he admitted that his affidavit was a
22 mistake to suggest to the Court in that case by way of an
23 affidavit that an IQ test that was given -- let me sure I have
24 the right thing. Excuse me -- that an IQ test that was given
25 would mean because of racial factors that the 77 could be

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1 lower because of AAMR evidence, and he admitted that the
2 evidence is that it's the other way. A black individual at
3 77, if there was a racial bias and there is evidence from the
4 AAMR that blacks will test lower than what they actually are,
5 do you agree with that? Your answer was: I think if I can be
6 as concise as possible about the point underlying this, if
7 there is a racial bias in tests, it is likely to make a
8 person's score lower, not higher. So I'm agreeing with the
9 correction that Dr. Hammer (phonetic) made as you described it
10 to me. Question: Which would be mean if there is racial
11 bias, a black individual score actually should be higher?
12 Answer: True. Question: So if there were racial bias on the
13 Stanford-Binet test where he scored 70, if that existed,
14 assume it did, the score would be, should be 71, 72 or
15 something higher? Your answer was: Well, the same could be
16 said for any test; if there is a racial bias it would work to
17 suppress or lower the score. Question: Do we know from
18 evidence in your discipline that there has been some cultural
19 racial bias in the past dealing with black individuals?
20 Answer: This is probably the most contentious issue in the
21 accomplishments of psychology for the last 100 years as to
22 whether this really represents bias or not. What can be said
23 clearly is that there are differences in scores. There are
24 racial differences in the scores; whether that's attributable
25 to bias on a test or other kinds of bias, we can argue

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1 endlessly." Do you recall giving that testimony?

2 A Yes.

3 Q And that testimony is making the observation and agreeing
4 with the observation that the test may well be biased against
5 African Americans; is that right?

6 A No. It said if there were bias. In fact there was an
7 earlier test. For example, when I first tested, I learned to
8 administer was the Stanford-Binet and it had no black people
9 in the standardization sample, so it was something that would
10 never be allowed today.

11 Currently, the people who develop IQ tests are
12 extraordinarily conscientious about this factor, and I think
13 the key word is if there were bias on the test.

14 Q Well, in your final statement, if I can read it, you say,
15 "What can be said clear is that there are differences in
16 scores; there are racial differences in the scores. Whether
17 it's attribute to the bias on the test or some other kind of
18 bias, we can argue endlessly."

19 So my question to you is not whether this testimony
20 establishes your belief that there is a racial basis on the
21 test, my question is: Didn't you testify in this case that
22 unfortunately, African Americans perform less well on these
23 standardized tests than the general population?

24 A That gap has -- still exists, although it is narrowing
25 substantially, and I don't know what the exact figure is for,

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1 you know, for this year for the Wechsler scale, there still is
2 a gap. And as stated in that quote, attributable to what
3 sources of bias, I do not know, but there is a gap and it's
4 perhaps due to improved education or whatever, the gap is
5 narrowing.

6 Q Okay. And we hope that it works all the way out.
7 However, in the meantime, the short answer to your question is
8 that you do recognize a performance problem in that subsection
9 of the community, correct?

10 A Well, there is lower scores for the population as a whole
11 on IQ tests. If that's what you are asking, yes.

12 Q The population, the African American population?

13 A The African American population compared to Caucasian
14 population throughout the United States.

15 Q Okay. And the test that you want or the one that you
16 highlight in your report is a test that was normed in 1989 or
17 1991, chose whatever date you want, correct?

18 A Yes.

19 Q The Dr. Nagler test was normed 20 some years ago?

20 A Yes.

21 Q And you testified in this case in 2004?

22 A Yes.

23 Q Doctor, I'd like to move to a new area.

24 You told us that you met with the defendant at some
25 point, correct?

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1 A Yes.

2 Q And you said that doing ABAS testing with the defendant
3 is verboten to you, correct?

4 A In my opinion, yes.

5 Q And that means you won't do it because it's fraught with
6 potential unreliable outcomes, correct?

7 A I believe so.

8 Q You got the cloak of confidence, correct? Right, that
9 the defendant -- that the person who is taking it could --
10 taking the test could, you know, act more knowledgeable than
11 they are or more functioning than they are, right?

12 A Yes.

13 Q But on the other side they could malingering, right?

14 A That's true.

15 Q And you also testified that you go in to meet with a
16 person who's facing a capital case using a great deal of
17 caution, correct?

18 A Yes.

19 Q And the reason you use caution is because this person
20 could potentially be malingering, correct?

21 A Or misrepresenting in whatever way.

22 Q And, you know, as you point out on a number of occasions,
23 the stakes are so high that a person would certainly have a
24 motivation to malingering, correct?

25 A Yes.

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1 Q And you've done these types of interviews in all of your
2 Atkins cases, correct?

3 A Yes.

4 Q And the reason you do the interviews is you want to get
5 in there and get a feel for the person, correct?

6 A That's one way to put it, yes.

7 Q And the reason you're doing this is because you want to
8 get a sense of a face-to-face meeting and see if there is
9 anything obviously wrong with a face-to-face meeting, correct?

10 A Yes. I want to know other things as well. I want to
11 know, for example, if the person is an accurate reporter of
12 even factual information. So, for example, when I say factual
13 information, I generally start out with very factual things I
14 expect the person can answer: When were you born, how old are
15 you, what are the names of people in your family, and so on,
16 because if the person can't do those things, they are either
17 malingerer or they have a pretty significant memory problem.

18 Q So on your direct examination you said that you don't --
19 you don't give too much significance to this meeting; is that
20 right?

21 A Well, no, I think the trouble with it is it relies very
22 heavily on clinical impressions or clinical judgement and less
23 on objective scores.

24 Q Okay. And so -- but when you are doing the -- when you
25 are having the meeting, you are actually administering maybe

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1 not formal adaptive functioning tests, but you are giving your
2 own little test to test the general performance of the person,
3 correct?

4 A To some extent, yes. It's mostly conversation, but yes.

5 Q And you did this in this case, correct?

6 A Yes.

7 Q And you went in and you actually -- you met with the
8 defendant on a couple of occasions, right?

9 A Yes.

10 Q And we'll talk about that couple of occasions, but I want
11 to treat them as a group right now and take the information
12 that you derived from the interviews and talk about that. Do
13 you understand?

14 A Yes.

15 Q You went in and you talked to Mr. Wilson about his job at
16 the prison, correct?

17 A Yes. That was on, I believe, my second interview.

18 Q And you just wanted to find out if he was working over
19 there?

20 A Yes, and if he could describe what it was about.

21 Q And he told you that he was working in the kitchen at the
22 time?

23 A Yes.

24 Q And that he had some measure of responsibility within the
25 work crew he was working, right?

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1 A Yes.

2 Q Was that significant to you?

3 A Well, within the caution that this is work in prison,
4 which is not work in the community setting. It told me some
5 things about how he spent his time and how well he did it from
6 his report.

7 Q You certainly didn't do any follow-up to see if what he
8 told you about his job and his performance in his job and the
9 performance of his colleagues was accurate, right?

10 A No. As I testified earlier, I did not have the
11 opportunity to interview folks at the prison.

12 Q Okay. And you asked him about three different areas and
13 I'll take you through them. The first thing that you -- or
14 one of the things that you did, because I don't know the
15 order, one of the things that you did is you showed him a map;
16 is that right?

17 A Yes.

18 Q And on the map you asked him to identify the continents;
19 is that right?

20 A Yes, I showed him obviously a map of the world.

21 Q And he had some problems identifying the continents,
22 right?

23 A Yes.

24 Q He said something like South Africa was a continent?

25 A Yes.

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1 Q And China was a continent?

2 A Yes.

3 Q And Russia was a continent?

4 A If you are reading from my report?

5 Q I'm reading from your report.

6 A Okay. Thank you.

7 Q And when you asked him what the furthest south continent
8 was he said, "it's Argentina or something or some "A" word,"
9 right?

10 A Yes.

11 Q Which was close, right, the furthest south is Antarctica,
12 right?

13 A Yes.

14 Q And he knew north, south, east and west, right?

15 A Yes.

16 Q And he was able to identify the United States on the
17 world map?

18 A Yes.

19 Q And he was able to find New York?

20 A Yes.

21 Q All right. He found New York; but otherwise, did not
22 have a strategy for finding locations on the map. That was
23 your assessment, right?

24 A Yes. I also showed him, and I'm not sure if it's clear
25 in the report, a map of the United States. So I started big

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1 with the world, and then the United States to ask him if he
2 could find north, south, east and west, and Atlantic and
3 Pacific Ocean and several other things that I think I noted in
4 my report.

5 Q That's right. And he identified the Pacific Ocean and
6 the Atlantic Ocean as well?

7 A Yes.

8 Q And you gave -- and you report this in your report,
9 right?

10 A Yes.

11 Q And even though you've testified that this was a matter
12 of questionable significance, you dedicated three pages of
13 your report to your interview of Mr. Wilson, right?

14 A I think you're demeaning the value of it a little bit
15 more than I would, but yes, I wanted to identify that I spent
16 portions of two days with him, I think it's worth describing
17 it.

18 Q Okay. So it is significant that you met with him and it
19 is significant that he provided you with this information,
20 correct?

21 A Yes, part of the big picture.

22 Q And this big picture needs to have information about how
23 the defendant is functioning right now when you meet with him
24 in jail, right?

25 A No. Because I'm not assessing and I'm not opining with

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1 regard to his current functioning, I'm trying to find out some
2 things that may be relevant to his functioning historically,
3 could he tell me about his functioning historically. And as I
4 mentioned as an example, if there is something -- I think I
5 gave the example that he could not use a ruler to measure, and
6 if he could not do that if he was 29 years old or 30, he was
7 about 30 at the time, then it's likely that he continued to
8 not master that skill since he was in school. Because that's
9 the caution, I'm not being asked about his current
10 functioning, I'm being asked about his earlier functioning.

11 Q Okay. And so you tested him on geography to find out if
12 he had intellectual deficits or intellectual problems, right?
13 That was the purpose, albeit stated very plainly?

14 A Yes, I guess -- yes, geography is a tiny part of
15 academic.

16 Q And for a guy who actually wasn't available for
17 education, he did okay on that test, right?

18 A No. I think you're giving a caution to say well, because
19 he wasn't very available for education, that would mean to
20 minimize whatever I found. And I think again, adaptive
21 functioning is functioning. He either knows it or he doesn't.

22 I did also mention that knowledge is not necessarily
23 the most valid form of information, because he knows where
24 something is doesn't necessarily means that he could use it in
25 a useful way, like find his way there.

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1 Q Well, doctor -- withdrawn.

2 Americans are not very good at geography, correct?

3 A I don't know what the standards are.

4 Q Well, for instance, in 2006 the National Geographic
5 Society tested a broad range of Americans between the age of
6 18 and 24 years old, and they found that 50 percent of those
7 Americans couldn't identify New York on the map. Are you
8 familiar why that statistic?

9 MR. BURT: I'm going to object to that. He's
10 testifying, it's not a question.

11 THE COURT: Well, I'll allow it, but you do have to
12 restate in order to put it in. Sustained.

13 Q Doctor, are you familiar with a study that was conducted
14 by the National Geographic Society in 2006 of Americans
15 between the ages of 18 and 24 that revealed that 50 percent of
16 those people surveyed couldn't find New York on a map?

17 A I'm not familiar with that information.

18 Q Are you similarly or are you also or maybe not, but I'll
19 ask you, are you familiar with the statistic that said that
20 that same group, two out of every ten of them couldn't
21 identify the Pacific Ocean?

22 A I'm not familiar with that.

23 Q But Mr. Wilson was able to identify the Pacific Ocean and
24 he was able to identify New York, correct?

25 A Yes, you are identifying the things that he could do.

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1 Q But he wasn't able to identify the continents, right?

2 A Yes.

3 Q And he wasn't able to identify some of the other things
4 that you listed in your report, like -- maybe you could tell
5 me.

6 A He couldn't find Florida on the map, which is a pretty
7 distinctive place. He couldn't find Texas on the map, which
8 was a pretty distinctive place. He could only find California
9 when he started on the east coast until he found every state
10 and found one that began with "C" and speculated that must be
11 California.

12 Q Now, do you have any reason to believe that other than
13 Staten Island, Queens and Riker's Island and Terra Haute,
14 Indiana, that this defendant has been outside New York City?

15 A No.

16 Q You know, Doctor, you've -- I mentioned that you've done
17 this same geography quiz in other cases.

18 Do you recall in the Umana case that you did a
19 couple of years ago you interviewed Umana that was facing the
20 death penalty?

21 A Yes.

22 Q And you asked Umana when you were representing or you
23 were retained by the defense to demonstrate that he was
24 mentally retarded, you asked Umana to see if he could identify
25 Charlotte, North Carolina on a map. Do you remember that?

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1 A Yes.

2 Q And do you similarly remember that you testified that you
3 had absolutely no information that Umana, who was from El
4 Salvador had ever set foot in Charlotte, North Carolina other
5 than his incarceration?

6 A He lived in Charlotte, North Carolina when he arrested.

7 Q Let me see if I can find that for you, Doctor. The Umana
8 transcript, 106. Question: You asked him to identify El
9 Salvador and the United States and Charlotte. Answer: Yes, I
10 showed him a map of the world and he was able to find El
11 Salvador. He was able to find the United States; although, he
12 was not able to find Charlotte, the approximate location of
13 Charlotte within the United States. Question: All right.
14 Now, you don't have any reason, you don't have any independent
15 knowledge that the defendant ever lived in Charlotte, do you?
16 Answer: No.

17 Is that a little bit different than what you just
18 told me?

19 A My recollection was he lived in Charlotte, but I suppose
20 I'm not correct.

21 Q Okay. Well, how about this one when you were in the
22 Davis case where you were working with Mr. Burt. You did
23 another one of these interviews where you were evaluating
24 somebody who you later testified was mentally retarded. And
25 in Mr. Davis' situation, you understood him to be illiterate,

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1 correct?

2 A I don't recall. He certainly had difficulty in --
3 academic difficulty. Whether he was illiterate, I don't
4 recall.

5 Q Didn't he tell you that he was illiterate?

6 A I don't remember.

7 Q Well, in your report in the Davis case at page ten, and
8 I'm quite sure Mr. Burt has this report, the bottom of page
9 ten, "He reports in the interview he still cannot read and is
10 a great source of embarrassment to him."

11 Does that sound like I'm reading that correctly,
12 Doctor?

13 A That sounds fine.

14 Q So if Mr. Davis who is illiterate, you decide to do the
15 map test with him as well, didn't you?

16 A I believe so.

17 Q For him you told him that you needed him to point out
18 Baltimore, right?

19 A Yes.

20 Q Okay. And Mr. Davis did not perform well on that test,
21 did he?

22 A I don't recall. I do recall that we started this
23 conversation minimizing the importance of this, and that's now
24 become very important in your view, so I'd just like to
25 clarify that the importance of this is being pushed way out of

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proportion.

(Continued on the next page.)

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1 BY MR. McGOVERN:

2 Q Is that your answer to my question about whether or not
3 you administered this test to Mr. Davis?

4 A I said, again, by saying I don't recall, I gave it to
5 him. Whether I asked him about Baltimore or Washington is
6 just where he grew up. I do not recall.

7 Q Well, maybe I could help. He did not perform well. Do
8 you recall that he pointed to Bloomington, right?

9 A I don't recall.

10 Q And you remember that the reason that he pointed to
11 Bloomington was because it started with a "B" and he can't
12 read, right?

13 A That sounded like a reasonable assumption.

14 Q Okay. Well, you did the match test or the geography
15 test, if you will, when you were helping out the government in
16 the Hill case. Do you remember that?

17 A Yes.

18 Q Okay. So now it's a different situation, right? You're
19 not working with the prosecutor in Trumble County?

20 A Yes.

21 Q You do the map test there. When you were working with
22 the prosecutor to determine whether or not this death row
23 inmate was mentally retarded, you gave him a map of his
24 hometown, isn't that right?

25 A Yes, my custom is in each of these cases is to give, I

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1 mean, it's not uniform.

2 Q Obviously.

3 A The world, the United States and your hometown. And in
4 fact, I gave Mr. Wilson a map of New York.

5 Q You gave Mr. Hill a map of Warren, Ohio, and asked him if
6 he could point out landmarks, isn't that right?

7 A Yes.

8 Q All right. By the way, Mr. Wilson, you asked him to use
9 the phone book. That's part of your standard of practice as
10 well?

11 A Yes.

12 Q And okay. And you were critical of his ability to use
13 the phone book, because you asked him to look up a lawyer, is
14 that right?

15 A I think I was descriptive. I don't know that I would say
16 I was critical.

17 Q Okay. Well, your description included reference to the
18 fact that you asked him to look up a lawyer in the phone book
19 and he was didn't do so well in that, right?

20 A He looked at "L" for lawyer instead of "A" for attorney.

21 Q And that would be something we should consider when we
22 mix the pot about whether or not he's mentally retarded?

23 A In a very small way.

24 Q Okay. And to be fair, you gave the illiterate Mr. Davis
25 the phone book test, too, right?

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1 A Probably. I don't recall.

2 Q Would you agree or is it your recollection that he
3 performed abysmally on that, right?

4 A I believe you. It would fit, but I don't recall.

5 Q Because it's hard, you agree, to read a phone book if
6 you're illiterate, right?

7 A That's part of what's being demonstrated.

8 Q Indeed. So, you were asked to look at the adaptive
9 functioning for this defendant, and you agreed to do so, is
10 that right?

11 A Yes.

12 Q All right. And we have shown you this chart or at least
13 Mr. Burt has shown you this chart. And this chart is
14 Government Exhibit 51. And it indicates that the defendant,
15 Ronell Wilson, was incarcerated for most of his adult life, is
16 that right?

17 A Yes.

18 Q All right. And if we look at the chart, there appears to
19 be a period that he was in the juvenile facility, right?

20 A Yes.

21 Q And you have given some testimony about your
22 understanding of that facility as being a therapeutic facility
23 or a correctional facility? I don't remember.

24 A Both.

25 Q Okay. But you would agree that it's a secure facility,

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1 right?

2 A Yes.

3 Q And that you cannot go and -- come and go as you like?

4 A Yes.

5 Q It would be a very structured environment, much like
6 those environments you said we should not consider in adaptive
7 functioning, correct?

8 A Yes.

9 Q He was out for a little while after that, right? He
10 popped out in November of 1999 and was out until April, is
11 that right?

12 A Yes.

13 Q So that's about four or five months of community time?

14 A Yes.

15 Q All right. And then again, he came out. He went to
16 Rikers Island for a while and then he popped out again in
17 March of 2001, and was out for about, I don't know, 18 months
18 or so until he got arrested in the fall of 2002. You see
19 that?

20 A Yes.

21 Q Okay. Now, other than that, there's -- he exits jail in
22 Redding, Pennsylvania, November 2002, and then by March of
23 that year, he's been locked up and he remains locked up 'til
24 today, after committing this -- the crime that you have
25 considered in this case, right?

Olley - Cross/McGovern

1 A Yes, sir.

2 Q Okay. You would agree that given that time line, that
3 this is a very challenging case for you, right?

4 A I don't know that the time line makes it a challenging
5 case in any specific way, but I'll be glad to answer more
6 questions on that.

7 Q Well, it's challenging because you're being asked to make
8 an assessment of somebody's adaptive functioning in the
9 community when they haven't really been in the community for
10 that long of a period of time?

11 A Up until his 18th birthday.

12 Q That's 15, sir.

13 A I'm considering that up until his 18th birthday as a
14 developmental period --

15 Q Okay.

16 A -- which is when we would want to assess. He was in the
17 community most of that time, with the exception of those
18 periods during his adolescence that you have indicated there.

19 From zero, of course, as Mr. Burt pointed out, zero
20 to ten is not indicated on this chart. So if you look at zero
21 to 18, most of his time was in the community.

22 Q And that's right. Zero to ten is not on this chart,
23 right?

24 A Yes.

25 Q So up until his 15th -- 'til he went to Brookwood at 15,

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1 you could do an adaptive functioning analysis of all of that
2 time, right?

3 A If I were present that time and had a good respondent,
4 yes.

5 Q And you have done with, retrospectively, correct?

6 A Yes.

7 Q And would you agree that that period of time from zero to
8 ten that we neglected to put on this chart is not particularly
9 informative of adaptive functioning for some of these
10 categories like working and self-care and home improvement or
11 whatever that one was, home living?

12 A It's not germane to work, for sure. Work is usually not
13 included at that age in -- well, it's not included in adaptive
14 behavior scales below a certain age.

15 For the other things, they are all relative to other
16 people of his age, so they're quite pertinent.

17 Q And but you would agree that that age, that time period
18 from zero to ten and even up to 15, has limitations as it
19 relates to, you know, some of those categories that I
20 discussed, like home living and work and some of the other
21 ones that are more considerate of older people?

22 A No. I think that while I agree with you and the test
23 developers would agree with you with regard to work, in other
24 respects, the test is standardized at a certain age and it
25 compares him to other people of the same age.

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1 And all of those things, such as home living are
2 adjusted for the expectations of someone who is of that age.
3 I gave the example of self-care, in which most of the
4 acquisition of those skills happens before age ten.

5 Q Okay. So your testimony is that when you were assessing
6 the defendant's adaptive functioning in the community, you're
7 using all of the time from zero up until 18 or 15?

8 A Excuse me. For the developmental period, it would be up
9 to age 18, and the benefit of getting information from many
10 people and many sources is to get a general picture about
11 whether we can assess his typical behavior in community
12 environments.

13 Q Okay.

14 A And that's why it's more valid to get information from
15 several sources than, for example, to give one test to one
16 person at one age point.

17 Q Okay. And you are unwilling to or you're unwilling in
18 this case to do any adaptive functioning analysis of any time
19 when the defendant was incarcerated, correct?

20 A Of his functioning at the time that he is incarcerated?
21 Yes, that's true.

22 Q On direct examination, you have slides dedicated to this,
23 that adaptive functioning in a custodial environment is
24 meaningless, right?

25 A Meaningless -- I think there are things we can learn from

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1 it, but they would not be the basis for -- primary basis for
2 assessing adaptive functioning.

3 Q And you didn't assess it in this case, right?

4 A Right.

5 Q You didn't assess his adaptive functioning for all that
6 time that he was in jail? You did not assess his adaptive
7 functioning?

8 A Well, I did in this sense that I looked at his Brookwood
9 records, which is a big chunk of that time in adolescence.

10 And as I mentioned earlier, it is both a correction facility
11 and a therapeutic facility. I think this is useful
12 information.

13 For example, Dr. Giglio -- Mr. Giglio provided good
14 information about he how he was functioning in a setting that
15 was therapeutic, meaning he should have done well, and to the
16 extent that he was responsive to the structure, as you
17 pointed, it's structure in the sense that you can't leave the
18 grounds, but it's intended to be therapeutic structure, as
19 well.

20 Q Do you have some knowledge of Brookwood, that it's not
21 like an incarceratory facility?

22 A My information is from the records and from speaking to
23 Mr. Giglio.

24 Q But you would agree that are records that could fill half
25 of this room related to Mr. Wilson while he's at the MDC and

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1 while he's at Terre Haute, while he was at Rikers and while
2 he's back at the MDC, right?

3 A Yes.

4 Q You didn't even look at those records at all?

5 A I did look at those records.

6 Q So they informed you on his adaptive functioning?

7 A They informed me, yes, in some aspects of his adaptive
8 functioning. For example, while he was at Terre Haute, he was
9 preparing to take the GED, which he never accomplished to do.
10 So I thought that was significant with regard to his academic
11 skills.

12 Q But you never went and spoke to any of the people who
13 know him from these facilities and gave them ABAS testing or
14 binder test?

15 A Excuse me. I didn't mean to interrupt.

16 Q You never gave a formal assessment to find out how he's
17 actually doing in jail, to determine whether or not he's
18 functioning at a level that's beyond that of a person who's
19 mentally retarded?

20 A I would have welcomed the opportunity to interview people
21 who knew him in that situation, but giving the Adaptive
22 Behavior Assessment System or any other standardized test
23 would have been very inappropriate.

24 Q In the Davis case, you testified that your experience is
25 that defendants want to talk about adaptive functioning in the

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1 community, while the government wants to focus on adaptive
2 functioning in the jails or wants to be able to use evidence
3 that's collected from prisons, is that right?

4 A That's often the case.

5 Q In fact, the question was, "How do you characterize that
6 different approach?"

7 And your answer was, "In my experience that position
8 has been one most embraced by the defense that being -- that
9 in Atkins hearing, you only use community adaptive functioning
10 and the position of the prosecution has more typically been to
11 assess the individual's functioning while incarcerated,
12 right?"

13 And the next question was, "So this is an issue
14 you've confronted in the past?"

15 And your answer was, "Yes."

16 THE COURT: Where were you reading from?

17 MR. McGOVERN: From the Davis transcript.

18 THE COURT: What page?

19 MR. McGOVERN: Pages 132 to 133.

20 THE COURT: All right.

21 MR. McGOVERN: I apologize, Your Honor.

22 BY MR. McGOVERN:

23 Q You remember giving that testimony?

24 A Yes.

25 Q And that testimony seems to be a commentary on strategy.

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1 Would you agree?

2 A Yes.

3 Q And that in your experience in the Atkins litigation
4 world, that the strategy is that the government wants to focus
5 on how the defendant is doing while he's incarcerated, while
6 the defendant wants to focus on how he's doing in the
7 community, right?

8 A Often, that's true.

9 Q Okay. But -- and you understand the foundation of that
10 strategy, do you not?

11 A (No response.)

12 Q I'll withdraw that.

13 You would agree that the government would have much
14 more access to information about a defendant when he's
15 incarcerated than when he's on the street? Do you understand
16 that?

17 A I understand what you're saying. I'm not sure that
18 that's true.

19 Q Okay. You would understand that a defendant, if he were
20 to attempt to prove his adaptive functioning in the community,
21 could rely on family members to prove up that adaptive
22 functioning, correct?

23 A That would be one good source, usually.

24 Q I'm sorry. I don't want to interrupt.

25 A That's okay.

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1 Q That's exactly what happened in this case, correct?

2 A That I may made use of the access to family members?

3 Q Yes.

4 A Yes.

5 Q And you interviewed -- the vast majority of the people
6 that you interviewed were folks that were either related to
7 the defendant or people who had dated him like Ms. Cook,
8 correct?

9 A Yes.

10 Q And those four tests that you asked the Court to rely on
11 or you posit on are the best ABAS-2 tests are from Monica
12 Cook, his ex-girlfriend, right?

13 A Yes.

14 Q His mother, right?

15 A Yes.

16 Q His older cousin?

17 A Yes.

18 Q And his sister?

19 A Yes.

20 Q And you would agree that those are folks who have an
21 interest in seeing that their loved one does not get executed,
22 correct?

23 A I assume that they have his -- yes, that they would like
24 him not to be executed.

25 Q Okay. I mean, it seems like you're struggling with that

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1 answer. Is that a hard thing for you to wrap your head around
2 or is it fairly obvious that they don't want their loved one
3 to be executed?

4 A No, I think that's fairly obvious.

5 Q Did anyone during these interviews say, you know what? I
6 don't want to do this. I would happy to see him executed?

7 A No.

8 Q And the government, as you said in Davis, tends to
9 talk -- want to interview people who are -- who know him in
10 the custodial setting, is that right?

11 A Yes.

12 Q And you said during your direct examination that you
13 treat the adaptive functioning interviews with caution, right?

14 A Yes.

15 Q All right. And the reason is because of what we just
16 said, that there's potential for bias, right?

17 A Yes.

18 Q And that in this case, you graded each one of these ABAS
19 evaluations and you -- did you say that you don't believe they
20 were biased at all?

21 A I don't think that I could ever absolutely guarantee
22 that. I think that I took considerable steps to protect
23 against bias.

24 Q All right. I mean, do you realize that for instance,
25 Monica Cook or did you know as a result of your interview with

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1 Monica Cook, that she still has romantic feelings about the
2 defendant?

3 A I did not perceive romantic feelings. She certainly
4 still cares about his welfare.

5 Q Okay. And that she, despite what she said in these
6 interviews, that she has communicated with him that he left
7 her when she needed him most.

8 A I don't recall words to that effect.

9 Q Okay. Do you realize that she drove out to Terre Haute
10 to go visit it him?

11 A I'm not sure. I don't believe that I recall that.

12 Q Do you have any reason to believe that recently, she got
13 a tattoo of RR on her body?

14 A I have seen that tattoo. So yes, it exists.

15 Q Do you know who RR is?

16 A Well, she has a tattoo that says "Ronell" on her arm.

17 Q Okay. And RR is "Rated R", and which happens to another
18 moniker that the defendant likes to go by.

19 A Okay.

20 Q Do you know that?

21 A No, I did not know that.

22 Q That would be something that you might want to consider
23 when you're considering whether or not these witnesses are
24 bias, right? That like, she still has feelings about him,
25 right?

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1 A I assume that all the people in the family have feelings
2 about him, and taking that into consideration to emphasize
3 getting objective information. Sure. That's important.

4 Q Okay. Another question about adaptive functioning is it
5 a challenge for you to apply these nationally norm standards
6 in the defendant's case?

7 A A challenge/

8 Q Yeah.

9 A I'm not sure.

10 Q Well, I mean, you have a life here that's been captured
11 on this board, unfortunately, where you have a person who was
12 in special education all of their life, right?

13 A (No response.)

14 Q Yes?

15 A Yes.

16 Q That even within the confines of the special education
17 system, did not perform particularly well, correct?

18 A Correct.

19 Q If what these folks are saying about ADD and learning
20 disabilities exist, he wasn't really available for too much
21 education, correct?

22 A Tell me more what you mean about available.

23 Q Well, how about this? He certainly didn't do very well
24 on your little meeting test, right? Your maps and your phone
25 book, right?

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1 A Correct.

2 Q So he's not exactly the most educated person that you've
3 ever come across, correct?

4 A Correct.

5 Q And basically, from the time he that was an adolescent,
6 he's been in and out of different forms of incarceration,
7 correct?

8 A Yes.

9 Q You would agree that his life growing up in those
10 projects in Stapleton, in an apartment where he was at a very
11 young age living with 13 other children in a project, in an
12 apartment, that his life does not compare well with the people
13 for whom your ABAS-2 tests are normed?

14 A Those factors and all the factors associated with poverty
15 have been acknowledged for many, many years to be major
16 contributors to mental retardation. So to the extent that
17 those factors have impaired his opportunities, they contribute
18 to his having a condition of mental retardation.

19 Q And you are absolutely against using any sort of other
20 way or like some other standard for assessing his adaptive
21 functioning other than these standardized tests, correct?

22 A (No response.)

23 Q In other words -- I'll withdraw that.

24 You made a comment in this courtroom earlier today,
25 that Dr. Denney had made reference to street smarts, right?

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1 A Yes.

2 Q You remember that? And that I don't want to quantify,
3 but you objected to that, right?

4 A Yes. I thought that that was not appropriate term to
5 use.

6 Q Yeah. That's not the type of information that you, in
7 your professional capacity, would use to test somebody's
8 adaptive functioning, right?

9 A Yes. And it's specifically mentioned in the AAIDD Manual
10 as an inappropriate concept in this -- for this purpose.

11 Q Okay. And you have dedicated two slides to this point.
12 I don't have their number -- but just would you agree that you
13 give us two slides in your presentation. One is the
14 definition of diagnosis of ID is not based on a person's
15 street smarts, right?

16 A Yes.

17 Q And you quote the AAIDD 2012. That's the supplemental
18 manual, right?

19 A Yes.

20 Q Still want to -- going to use the 2012 for that premise.
21 And then on another slide, you say test of current knowledge
22 administered to defendant, for example, street survival skills
23 questionnaires is no good, right?

24 A Which is probably unnecessary, because that test was not
25 used in this case. It's just an example of a kind of test

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1 that can be yielding misleading information.

2 Q Yeah. And what happens is sometimes, government-type
3 psychologists want to go in and test a defendant's street
4 smarts, because they made -- that defendant may not have been
5 as available for education smarts because have their
6 upbringing, right?

7 A I don't understand what -- well, if by street smarts,
8 we're creating another concept of a kind of intelligence or a
9 kind of adaptive behavior and trying to substitute that for
10 the most customary methods of assessing adaptive behavior,
11 then I don't agree with that.

12 Q Okay. You were very clear about it. You have two
13 slides, right?

14 A Yes.

15 Q Your article also says -- your chapter in that adaptive
16 functioning book says, for example, "Tests that require an
17 oral answer or pointed to the right answer or pointing to a
18 picture of the right answer are likely to be inadequate
19 indicators of actual community functioning, correct?"

20 A Yes.

21 Q What you're talking about is the Street Survival Skills
22 Manual, right?

23 A Yes.

24 Q Or questionnaire?

25 A Questionnaire, yes.

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1 Q And so that's an inappropriate way to assess adaptive
2 functioning, to even talk about street smarts, right?

3 A That -- well, it doesn't say street smarts, but it has a
4 similar sort of notion that it's getting at practical skills.
5 And indeed, to the extent that it touches that adaptive
6 behavior, it's almost entirely derived from practical skills.

7 Q Okay. And you're against that --

8 THE COURT: List him finish.

9 MR. MCGOVERN: Oh, I'm sorry.

10 A As I indicated, a test of knowledge.

11 Now, I've used it in the past in other settings.
12 I've come to the conclusion that it's out of date and not
13 appropriate for this purpose.

14 Q Okay. You mean in the Hill case?

15 A Yes.

16 Q Because that's exactly what did you when you were working
17 for the government, right?

18 A (No response.)

19 Q You gave Mr. Hill this Street Survival Skills
20 questionnaire, right?

21 A I did.

22 Q All right. That's the test that we talked about, where
23 you point to things and it's not verbal -- excuse me. It's
24 not a written test, correct?

25 A Right. It's pointing at pictures.

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1 Q And you did it to assess his adaptive functioning,
2 correct?

3 A In part. And because now, certainly, looking back at
4 that, there are other things that I would do differently, but
5 in part, because the judge's order was to assess adaptive
6 behavior in prison.

7 Q But Doctor, you're saying that the Street Survival Skills
8 questionnaire is not a valid indicator of adaptive
9 functioning, right?

10 A Yes.

11 Q Right?

12 A Yes.

13 Q That's what you quote the manual for. That's what you
14 quote -- that's what you're saying in your learned articles,
15 right?

16 A Yes.

17 Q So when the judge says to you, test out his adaptive
18 functioning, you turn to the Street Survival Skills
19 questionnaire. Am I wrong?

20 A No. You're absolutely right, and that it was in 2004. I
21 have not used it since.

22 Q So this is another instance where you have learned since
23 2004, that you wouldn't do this and you wouldn't do this
24 again, right?

25 A That's true.

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1 Q Right? Because you actually violated in 2004, when you
2 were working for the government, you actually violated the
3 rule that you write about to all these psychologists out here
4 who want to get on the Atkins train -- or excuse me, the
5 Atkins forensic list -- you write to these people and tell
6 them, I'm writing this article. Don't do this questionnaire,
7 because it's not good science, right?

8 MR. BURT: Question is argumentative.

9 THE COURT: No, it's not.

10 You may answer.

11 BY MR. McGOVERN:

12 Q Right?

13 A That's certainly been my position since 2004. I felt
14 that it was not helpful in Hill, and I regret having --

15 Q And in 2010 --

16 THE COURT: Let him finish.

17 Are you done, sir?

18 THE WITNESS: No, I was just --

19 THE COURT: Are you finished with your answer is my
20 question.

21 THE WITNESS: Yes, sir.

22 THE COURT: Okay. Next?

23 BY MR. McGOVERN:

24 Q And 2010, when you sat for that lengthy deposition about
25 the Hill case, you didn't say, oh, I shouldn't have given him

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1 the Street Survival Skills questionnaire, right?

2 A I don't recall having that come up.

3 Q Okay. And when you filed that affidavit that led to
4 Mr. Hill having that deposition, you didn't raise the Street
5 Survival Skills questionnaire, right?

6 A I did not.

7 Q In fact, what you did raise in that questionnaire --
8 excuse me, in that affidavit -- was that you would have liked
9 the opportunity to find out additional information from other
10 death row inmates -- and I'll mark this, if you'd like -- from
11 other death row inmates to be relevant, that I would have
12 considered. It would have been useful for me to talk to these
13 individuals, had they been made available to you. Do you
14 recall that being in your affidavit?

15 A Yes.

16 Q Okay. And that would have been additional information
17 that you would have wanted to have considered in the adaptive
18 functioning area from other inmates in the facility, correct?

19 A Yes.

20 Q Okay. And that is information that you assert in this
21 courtroom would be not credible adaptive functioning, right?

22 A It was on the list that I called questionable sources of
23 information. So I didn't say that one should never talk to
24 people, but I think the interpretation of it would be
25 difficult.

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1 Q So in 2010, you were comfortable relying on or desirous
2 to rely on questionable sources of information; is that right?

3 A No. I was looking at how much information had been
4 gathered in 2004. And looking back on it and thinking of
5 things that I could have done to supplement.

6 Q Okay.

7 In the 2004 case, in the Hill case, you actually did
8 a full adaptive functioning analysis for Mr. Hill as it
9 related to his life in prison, correct?

10 A It was not -- well, it did focus a lot on his life in
11 prison because that's what the judge requested. I, with the
12 wisdom of hindsight, I would have liked to have like people
13 who knew him in community settings.

14 Q I have to ask you a question based on that. Does the
15 judge's order about about when he wants the assessment to be
16 made about what the date of the assessment is, does that, in
17 your view, affect the credibility of the testing method?

18 A Yes, I think it was compromised.

19 Q What was compromised, your standards, because of his
20 order?

21 A You know, I relied on, -- I didn't rely on it very
22 strongly but I did use the street survival skills
23 questionnaire, which was not a good decision. And I put
24 lot -- got a lot of information from correction officers who
25 knew Mr. Hill because of -- and talked to them about his

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1 functioning in prison. This was -- and again, as I mentioned
2 earlier, it was required that the three experts collaborate
3 and come up with a mutually agreed upon plan to do the
4 evaluation. And I wish now that I had argued more strongly
5 for other methods, but that was what I agreed for.

6 Q Is that true, you were arguing more strongly for other
7 methods?

8 A I said I wished I had argued more strongly.

9 Q I want to wrap this idea up with you.

10 If what you are saying here in court is to be
11 credited, you're saying that we should look at Mr. Wilson's
12 adaptive functioning from way back here at zero years old up
13 until 23 years old to determine whether or not he was mentally
14 retarded on that date, right?

15 A On what date?

16 Q On the date of March 10th, 2003.

17 A Up until he was 21, I think, so yes.

18 Q Twenty.

19 A Was he 20? He was born in --

20 Q '82. May 6th, 1982.

21 A Okay. So he was almost 21.

22 Q Okay. He was almost 21. But what you're saying is, is
23 you're going to make this assessment about his mental
24 retardation on this date based on all this information that
25 you collected from zero to 20?

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1 A No. I'm saying that all that time period is relevant.

2 Q Okay.

3 But the ABAS testing that you did and the numbers
4 that you rely on for your findings --

5 A Yes.

6 Q -- on the ABAS Standardized Testing deal with zero up
7 until about 19 years old?

8 A Yes.

9 Q Right. So in the Hill case, you're asked to assess
10 whether Mr. Hill is mentally retarded at 37 years old, right?

11 A Yes.

12 Q But you didn't use the information that occurred in his
13 life from zero to 19 years old in the adaptive functioning
14 context to make that determination, right?

15 A Yes. That's an example of when I said I wish I had the
16 opportunity to do more of the kinds of things that I've done
17 in this case.

18 Q In Hill you interviewed six staff members at the
19 facility, right?

20 A I interviewed several. I don't remember if it was six.
21 But that sounds right.

22 Q You interviewed zero here, right?

23 A Yes.

24 Q At the MDC, zero?

25 A Yes.

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1 Q All right. You've made some statement that the -- nobody
2 at the MDC was available to you, right?

3 A I said I inquired about their availability and I was, you
4 know, I don't know what the problem was. But they -- I don't
5 know if it was scheduling or what it was, but I didn't see
6 anyone.

7 Q I'm going to violate a cardinal rule of my own practice.
8 Who did you inquire about? Who did you make that
9 inquiry of?

10 A I made that inquiry of Mr. Hill's defense team.

11 Q This is Mr. Wilson. Mr. Wilson's defense team?

12 A Excuse me. Mr. Wilson.

13 Q And they told you that corrections officers are
14 unavailable, is that it?

15 A Yes.

16 Q These folks, which one, was it Ms. Brady?

17 A Most likely Ms. Brady, yes.

18 Q You understand that some of these folks are over at that
19 MDC at multiple days a week basis and they're telling you that
20 there are no CO's that you could talk to?

21 A I don't recall the circumstances. I recall that I
22 inquired about it, it never happened.

23 Q Would you be surprised that they were interviewing CO's
24 on their own?

25 A I don't know anything about that.

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1 Q Okay.

2 But if they were and they didn't make them available
3 to you, that would make -- that would be something that you
4 would not be pleased about because you wanted talk to CO's,
5 right?

6 A Yes. Of course I was in North Carolina most of that
7 time, so there are practical considerations. But yes, I would
8 have liked to.

9 Q Are the practical considerations that you're referencing
10 basically that in all likelihood you weren't going to
11 interview any CO's anyway?

12 A I never concluded that. I put in the request.

13 Q Orally, I suspect?

14 A Yes.

15 Q I have a new area from your report.

16 THE COURT: How much time on the new area do you
17 think is going to take?

18 MR. McGOVERN: This one I'll be discreet and quick.

19 THE COURT: Well, quick? Can we be more specific
20 since we're talking about specificity all day here?

21 MR. McGOVERN: I think we should break for the day.

22 THE COURT: Thank you very much.

23 Before we conclude. Can I get a sense of about how
24 much more you have on cross overall?

25 MR. McGOVERN: Overall, I will say maybe another

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1 hour and a half.

2 THE COURT: Another hour and a half. And then on
3 redirect?

4 MR. BURT: I can probably do it within an hour. Now
5 I'm wondering an hour and a half at the first estimate ended
6 up being five or six. And I'm concerned about schedule.

7 THE COURT: We're doing better than nine, aren't we?

8 MR. BURT: I'm not going to comment on that because
9 last time I did I overstepped myself.

10 THE COURT: You did it three times.

11 MR. BURT: I know and the court was right and I
12 apologize.

13 THE COURT: That's all right. I'm not asking or
14 apologies. I get the point the first time, as you can tell.

15 MR. BURT: I know and you were right.

16 THE COURT: About an hour?

17 MR. BURT: About an hour for for me.

18 THE COURT: And then what? It's really where I'm
19 going is, what should the court be preparing for with your
20 next witnesses?

21 MR. BURT: We're going to have Dr. Drob here. So
22 he'll go first after Dr. Olley. Then we're going to have
23 Depetra, his sister. After that -- and we are trying to line
24 up beyond that Kathy Yates, who is the neuro psychologist who
25 is not on our witness list, but in view of the

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1 cross-examination today, we're going to have to call her
2 concerning the nature of the evaluation that she conducted. I
3 don't anticipate that's going to be a lengthy examination but
4 we are going to have to call her. And then beyond that we
5 have Dr. James lined up. And I think that will more than fill
6 the day for us.

7 THE COURT: That's all of that in one day?

8 MR. BURT: Well, I don't think we'll get to all of
9 it in one day, but that's certainly what's coming in the
10 future.

11 THE COURT: How long is Dr. Drob on direct?

12 MR. BURT: I think the direct for him will take
13 maybe an hour.

14 THE COURT: And the cross?

15 MR. McGOVERN: Probably an hour.

16 THE COURT: All right. So we will get to Dr. Drob
17 and then we'll get beyond Dr. Drob. And who would be next?

18 MR. BURT: That would be Depetra Wilson and she's
19 probably going to be another hour, hour and a half direct.

20 THE COURT: And on cross?

21 MR. McGOVERN: Oh, I don't know. Probably a half an
22 hour.

23 THE COURT: All right. That's about as far as we're
24 going to get tomorrow, probably. But if we get really lucky,
25 who's after that?

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1 MR. BURT: We would either try and do Ms. Yates
2 because I anticipate she'll be fairly short. Or if she's not
3 available, we would start with Dr. James.

4 THE COURT: All right.

5 MR. McGOVERN: I have just one comment on Dr. Yates.
6 We don't have a problem with Dr. Yates being called for the, I
7 guess, to testify about the scope of her retainer. There are
8 a couple of problems, however. One, I don't know if the
9 court's resolved the issue about Dr. Yates' notes and the
10 discoverability of those notes that we talked about a while
11 ago. And then Dr. Yates has not been noticed as an expert.
12 So I'd be extremely, I guess, --

13 THE COURT: Weary.

14 MR. McGOVERN: Weary of her coming up here and
15 offering a medical opinion because she's not an expert. She's
16 never been noticed and I think it would be highly improper at
17 this stage.

18 MR. BURT: It's been suggested twice in
19 cross-examination, once with this witness, once, I believe,
20 with Dr. Shapiro that she did a full evaluation of Mr.
21 Wilson's mental retardation. She did not. She never met him.
22 There was no evaluation done. The government knows that
23 because they interviewed her. So we're going to have to
24 establish that factually because that appears to be an issue
25 of dispute here.

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1 THE COURT: That's an issue of fact.

2 MR. McGOVERN: I think we can actually stip that
3 out. I mean we would stipulate that Dr. Yates never met with
4 the defendant nor that she conducted an extensive
5 neuropsychological evaluation.

6 MR. BURT: Well, I'll meet and confer.

7 THE COURT: Why don't you talk about that and see if
8 you can resolve it by stipulation.

9 MR. BURT: Yes, your Honor. And as I understand the
10 Court's ruling on both Dr. James and Dr. Woods, we're not
11 going to do direct other than along the parameters the court
12 suggested.

13 THE COURT: Right.

14 MR. BURT: So that will go a lot quicker just for
15 the court's planning.

16 THE COURT: Okay. Thank you very much.

17 MR. McGOVERN: And I have one final request, your
18 Honor. I think it's standard. I would ask that Mr. Burt not
19 be in contact with the witness while on cross-examination.

20 THE COURT: Not be in contact with this witness?

21 MR. McGOVERN: This witness. During Dr. Shapiro's
22 testimony on cross-examination, he admitted that he spent the
23 overnight working with Mr. Burt to prove the correct date for
24 the normative data. Look, I'm not saying it's improper, but
25 I'd ask that the court direct limited contact with this

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1 witness while he's on cross-examination.

2 MR. BURT: I don't see anything inappropriate with
3 talking to the witness. If the court does, then so be it.

4 THE COURT: I don't have any problem with you
5 talking to the witness. He's an expert witness. You can
6 cross him on what he discussed with counsel --

7 MR. McGOVERN: Sure.

8 THE COURT: -- overnight if that would cast some
9 light on any late breaking testimony.

10 MR. McGOVERN: Okay. Thank you.

11 MR. BURT: Judge, in terms of the transcripts that
12 were referenced, I have Davis and the other one. But I don't
13 have this Hill transcript so I would appreciate at some point
14 getting copies so I can follow along.

15 THE COURT: Yes, I'd like the copies of the
16 transcripts that you're going to utilize. I don't need them
17 until you use them. In other words, you don't have to produce
18 them in advance of your cross-examination. But for purposes
19 of cross-examination, it's important that we be able to read
20 along.

21 MR. McGOVERN: Okay. I will bring copies tomorrow.

22 MR. STERN: Can I ask you to authorize a copy of the
23 transcript to be sent to my office. I think only Mr. Burt is
24 getting it.

25 THE COURT: Okay, that's fine. You can also have

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1 one copy. One copy for Mr. Burt over at the Marriott and one
2 copy for you wherever you are.

3 MR. STERN: I'm going to have it at my office, not
4 my home, if that's okay.

5 THE COURT: Anything further?

6 MR. McGOVERN: No, your Honor.

7 MR. BURT: No, your Honor.

8 THE COURT: Thank you very much. We'll see you
9 tomorrow morning at 9:00 a.m.

10 Have a good evening.

11 (Time noted 7:02 p.m.)

12
13 (Whereupon, the matter was adjourned to November 29, 2012 at
14 9:00 a.m.)

15
16 CERTIFICATE OF REPORTER.

17 I certify that the foregoing is a correct transcript of the
18 record of proceedings in the above-entitled matter.

19
20 _____
21 Judi Johnson, RPR, CRR, CLR
22 Official Court Reporter
23
24
25

I N D E X

WITNESSES:

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VOIR DIRE EXAMINATION:

Olley 451

DEFENDANT'S EXHIBITS MARKED IN EVIDENCE

F574

GOVERNMENT'S EXHIBITS MARKED IN EVIDENCE

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